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In the Supreme Court of the United States

OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a federal agency's compliance with Office of Management and Budget Circular A-76, an Executive Branch management policy directive that establishes guidelines for agency decisions whether to contract out functions to private enterprise, and with laws and regulations concerning contracting out is a proper subject of negotiation and arbitration between the agency and an employee union under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (App., *infra*, 40a-48a) is reported at 10 F.L.R.A. 3.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 49a-50a) was entered on September 21, 1984. A timely petition for rehearing was denied on December 3,

1984 (App., *infra*, 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 7103(a)(9) provides:

"[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides:

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to deter-

mine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

STATEMENT

1. In October 1978 Congress enacted the Civil Service Reform Act of 1978 (the Act), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII of the Act, 5 U.S.C. 7101 *et seq.*, governs labor-management relations, including

collective bargaining, for nearly all federal agencies.[1] Title VII replaced the federal labor relations program created in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.).[2]

Under the Act, a federal agency is required to bargain in good faith with a federal employee union about conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2); *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 2-3. "[C]onditions of employment" are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). The Act provides that if an impasse is reached, either party to the negotiations may ask the Federal Service Impasses Panel (the Panel) to intervene. 5 U.S.C. 7119(c). The Panel has the authority to judge a proposal on its merits and to order the parties to adopt it. 5 U.S.C. 7119(c)(5)(B) and (C); see 5 C.F.R. 2471.11(a). Thus, unlike the situation in the private sector, a determination that a bargaining proposal is negotiable carries with it the possibility that the proposal ultimately will be incorporated as part of the collective bargaining agreement pursuant to an order of the Panel. A union may use the grievance and arbitration process to challenge management actions that

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[1] Certain federal employees, including members of the uniformed services and the Foreign Service, and certain agencies, including the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency, are excluded from the coverage of Title VII. See 5 U.S.C. 7103(a)(2) and (3). United States Postal Service employees also are excluded from Title VII coverage, since labor relations matters involving those employees are within the jurisdiction of the National Labor Relations Board. See 39 U.S.C. 1209.

[2] The executive order program was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Executive Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

allegedly violate the collective bargaining agreement. 5 U.S.C. 7103(a)(9)(C)(i), 7121.

Congress excluded from the requirements of the Act matters affecting certain management rights, including the right "to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). An agency's duty to bargain with respect to these reserved rights is limited to the "procedures which management * * * will observe in exercising" the rights and "appropriate arrangements for employees adversely affected" by exercise of the rights. 5 U.S.C. 7106(b)(2) and (3). The Act also precludes an agency from bargaining when it would be "inconsistent with any Federal law or any Government-wide rule or regulation" and over any "matters which are the subject of * * * a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).

The Act established the Federal Labor Relations Authority (FLRA or Authority) as a three-member independent body within the Executive Branch with responsibility for, inter alia, supervising the federal collective bargaining process and the grievance and arbitration machinery established by Title VII. Among other responsibilities, the Authority adjudicates negotiability disputes and unfair labor practice complaints and reviews arbitral awards. 5 U.S.C. 7105(a)(2)(A)-(I). The Authority may seek enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of FLRA orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

2. In 1980, during the course of contract negotiations with the Equal Employment Opportunity Commission, respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (the union) proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.

App., *infra*, 40a. Office of Management and Budget Circular A-76, to which the proposal refers, is a management policy directive applicable to all Executive Branch agencies that establishes guidelines for agency decisions whether to contract out to private enterprise for products and services the government needs. The EEOC took the position that the duty to bargain in good faith did not extend to the union's proposal and that bargaining on such matters "would be inconsistent with law, rule and regulations" (C.A. App. 9). The union subsequently submitted the proposal to the FLRA for a negotiability determination (*id.* at 1-2).

3. The FLRA ruled that the union's proposal was negotiable (App., *infra*, 40a-48a). The Authority recognized that the proposal addressed a subject listed in the management rights provision of the Act, 5 U.S.C. 7106(a) (App., *infra*, 40a-41a). The Authority nevertheless concluded that the proposal would not contravene that provision, because it "would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management" (*id.* at 41a).

The Authority also acknowledged that bargaining about the union proposal ultimately could result in subjecting disputes about compliance with Circular A-76 to the grievance and arbitration process, in apparent conflict with the exclusive nature of the appeals procedure provided in the Circular (App., *infra*, 42a). It concluded, however, that even assuming the existence of a conflict between the proposal and the Circular and that the latter fit within the statutory definition of a "Government-wide rule or regulation," the Circular could not "limit the *statutorily* prescribed scope and

coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in original).[3]

4. A divided panel of the court of appeals enforced the order of the Authority (App., *infra*, 1a-37a). The court concluded that the union proposal would not unduly restrict management's reserved right to make contracting-out determinations for two reasons. First, the court reasoned that the phrase "in accordance with applicable laws" in the management rights clause, 5 U.S.C. 7106(a), operated to restrict the authority reserved to management. Thus, while agencies generally need not bargain with respect to their right to make contracting-out determinations, the court concluded that they were required to bargain about the duty to comply with all "applicable laws" affecting that right. App., *infra*, 8a-11a.

Second, the court of appeals concluded that the union proposal would not divest management of any existing control over the contracting-out process. The court believed that a union claim that management had failed to comply with contracting-out guidelines would fall within the statutory definition of a grievance, 5 U.S.C. 7103(a)(9), and that arbitrators therefore would have jurisdiction to decide such claims even if there were no collective bargaining agreement provision requiring compliance. App., *infra*, 11a-16a.

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[3] The Authority also found negotiable a proposal that the EEOC should notify the union of its intention to solicit bids for contract work that could result in reductions-in-force or transfers affecting employees, with a full explanation of the reasons for the agency's actions and opportunity for the union to respond in writing. The Authority found nonnegotiable a proposal that would have required the EEOC to minimize the effect of contracting-out decisions on employees, on the ground that the proposal would interfere with management's statutorily reserved right to lay off employees. App., *infra*, 43a-47a. Neither of these determinations is at issue at this stage of the proceedings.

The court of appeals also rejected the EEOC's claim that the union proposal was inconsistent with the exclusive appeals procedure established by Circular A-76. In the court's view, allowing the text of the Circular to restrict the scope of grievances under the Act would inject limitations not created by Congress. App., *infra*, 16a-17a.

Judge MacKinnon dissented (App., *infra*, 18a-37a). He concluded that the union proposal conflicted with the plain language of the management rights provision because it required compliance with substantive policy-making criteria for contracting out (*id.* at 22a-26a). Judge MacKinnon also determined that alleged violations of Circular A-76 would not be statutorily grievable in the absence of a contractual provision requiring compliance with such directives because the Circular does not "affect[ ] conditions of employment" within the meaning of 5 U.S.C. 7103(a)(9). Inclusion in a collective bargaining agreement of an agency commitment to comply with the terms of the Circular therefore would permit a union to obtain arbitration of issues that otherwise would not be grievable and would allow arbitrators to review determinations specifically committed to agencies by the management rights provision of the Act. App., *infra*, 29a-36a.

The court of appeals denied the EEOC's petition for rehearing with suggestion for rehearing en banc, with Judges Bork, Scalia, and Starr dissenting from denial of the suggestion for rehearing en banc (App., *infra*, 38a-39a).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning administration of the federal labor relations program established under Title VII of the Civil Service Reform Act of 1978. The court of appeals' decision requires a federal agency to bargain with the union about a proposed collective bargaining agreement provision that

would require the agency to comply with Office of Management and Budget Circular A-76, an executive management policy directive that establishes guidelines for determinations whether to contract out agency functions to private enterprise.[4] The decision opens the door to a system under which labor arbitrators (with ultimate enforcement by the FLRA) may review substantive agency contracting-out determinations, despite Congress's specific reservation of such determinations to management under 5 U.S.C. 7106(a). In view of the economic interest of their members in any determination to contract out an agency function, federal employee unions have a strong incentive to mount vigorous challenges to such determinations and to search diligently for arguable agency violations of the detailed provisions of Circular A-76. As Judge MacKinnon explained, the decision creates an "extraordinary potential for vexatious litigation" (App., *infra*, 36a) and affords unions "a fertile source of weapons for obstructing or delaying contracting-out decisions, a situation Congress specifically sought to prevent" (*id.* at 35a).

The system of arbitral review authorized by the decision below would undermine seriously the potential for realizing efficiency gains through the contracting-out process. The Office of Management and Budget advises us that the estimated loss in cost savings to the federal government from delays due to arbitral review of disputes concerning future contracting-out determinations would amount to approximately $142 million for the pe-

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[4] The union proposal refers to compliance with Circular A-76 and "other applicable laws and regulations concerning contracting-out." See App., *infra*, 40a. The EEOC does not have its own contracting-out regulations, but it is generally subject to the provisions of the federal acquisition regulations, 48 C.F.R. Ch. 1. Since the parties in this case have focused on Circular A-76, we will refer primarily to the Circular in this petition.

riod from fiscal year 1986 through fiscal year 1989.[5] Potential contractors may become reluctant to bid on government projects, since market changes during the period of arbitral review may render the original bids obsolete. Losses also may result if an agency elects to proceed with a project while a grievance is pending and an arbitrator later disagrees with the agency's judgment concerning the application of Circular A-76 and orders rescission of the contract and back pay for displaced federal employees. The decision below thus creates a serious potential for slowing the contracting-out process very significantly, or even halting it entirely.

The impact of the decision below extends beyond the area of contracting out. Under the court of appeals' reasoning, it appears that a union could obtain arbitral review of an agency's exercise of any of the enumerated rights reserved to management under the Act merely by asserting that the agency had failed to comply with some relevant legal requirement. In addition, by extending its analysis to Circular A-76, an executive management policy directive, the court of appeals appears to have created a precedent for other steps that would infringe on the President's inherent authority to manage Executive Branch agencies. Review by this Court is plainly warranted.

1. OMB Circular A-76 was issued by the Office of Management and Budget, a part of the Executive Office of the President, pursuant to delegated presidential management authority. The Circular establishes "the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using Government facilities and personnel." 44 Fed. Reg.

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[5] See page 11, *infra*, for an estimate of cost savings now being realized by the Department of Defense from past contracting-out determinations.

20557 (1979).[6] The Circular prescribes detailed steps that agencies should follow in making the cost analyses that are used to determine whether to contract out to private industry for goods and services the government needs or to retain performance of a function in-house. The Department of Defense has reported that Circular A-76 studies it has completed since 1979 now generate more than $409 million annually in cost reductions. U.S. Office of Management and Budget, *Management of the United States Government: Fiscal Year 1986*, at 45 (1985). The President has established as a priority program the implementation of various efficiency measures, including increased use of contracting out pursuant to Circular A-76. *Id.* at 43-46; U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1986*, at 2-26 (1985).[7]

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[6] The longstanding policy of the federal government to acquire needed goods and services from the private sector whenever it would be feasible and efficient to do so was first recognized officially in Bureau of the Budget Bulletins, issued in 1955, 1957 and 1960. In 1967, this policy was expressed and implemented in a directive known as Circular A-76. See 44 Fed. Reg. 20558 (1979). The Circular was revised substantially in 1979. 44 Fed. Reg. 20556. It has been amended in several respects since then. See 45 Fed. Reg. 69322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37114 (1983). The 1979 version of the Circular was in effect at the time of the contract negotiations in this case.

In recent years Circular A-76 and amendments thereto have been published in the notice section of the Federal Register. The supplement to the current version of the Circular is not reprinted in the Federal Register because of its length. We are lodging with the Clerk of the Court and providing to counsel for respondents copies of the supplement.

[7] The President's Private Sector Survey on Cost Control (also known as the Grace Commission) has strongly endorsed the use of Circular A-76 to bring badly needed reform and cost savings to governmental operations. The Grace Commission has estimated that the federal government could save $7.39 billion over a three-year period by implementing the Circular aggressively. 10 Presi-

The Circular provides that it "does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular," except as provided in the Circular itself. 44 Fed. Reg. 20558 (1979). See also 48 Fed. Reg. 37114 (1983). The Circular directs each agency to establish an appeals procedure that protects "the rights of all affected parties—Federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives." 44 Fed. Reg. 20561 (1979). Under such procedures, a party directly affected by an initial agency contracting-out determination may file an objection; an impartial agency official at a level organizationally higher than the official who approved the original decision must rule on any objection within 30 days. The Circular provides that the decision on appeal is "final" and that the appeals "procedure and agency determinations may not be subject to negotiation, arbitration, or agreements." *Ibid.* [8]

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dent's Private Sector Survey on Cost Control, *Report on Management Office Selected Issues: Opportunities Beyond PPSSCC* 2-4 (1983). The Congressional Budget Office has estimated that in the long term savings from full implementation of the Circular on a government-wide basis would amount to $1.1 billion annually. 2 U.S. General Accounting Office, *Report of the Comptroller General: Compendium of GAO's Views on the Cost Saving Proposals of the Grace Commission* 230 (1985).

[8] At the time the appeals procedure was first included in Circular A-76, the Office of Management and Budget explained that it was designed to "promote more effective and consistent implementation" of the Circular and to "provide a level of visibility and discipline that should significantly enhance implementation." 44 Fed. Reg. 20557 (1979).

The appeals procedure provisions are now found in the supplement to Circular A-76 (at I-14 to I-15). Under the current procedures, a party directly affected by an agency decision to contract out may request detailed documentation supporting the agency's

2. The court of appeals' holding that the EEOC must bargain about compliance with Circular A-76 is plainly inconsistent with the Act.

a. Congress enacted the management rights provision of the Act, 5 U.S.C. 7106, "to preserve the essential prerogatives and flexibility Federal managers must have." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 43-44 (1978). Section 7106(a) specifically provides that "nothing" in the Act shall affect "the authority of any management official of any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out." On its face the provision renders nonnegotiable any bargaining proposal that would affect substantive agency decisions involving contracting out for goods and services. See H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978) (Section 7106 "requires the agency to retain the right to make determinations with respect to contracting out work"). Since the union proposal at issue in this case requires management to comply with substantive policy guidelines for contracting-out determinations, it encroaches on a reserved management right and is nonnegotiable under Section 7106.

Moreover, bargaining about the union's proposal ultimately means that labor arbitrators, rather than federal agencies, may be making substantive contracting-out decisions. As we explained above (at page 4), if the Federal Service Impasses Panel orders inclusion of the union proposal at issue here as part of the collective bargaining agreement, the union may file grievances challenging management's determinations to contract out certain functions, by alleging some arguable violation of the detailed provisions of Circular A-76. If the

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cost comparison analysis; appeals must be filed within 15 working days of receipt of the documentation. As in the 1979 version of the Circular, a decision must be rendered within 30 calendar days of receipt of the appeal.

agency denies the grievance, the union may request arbitration. Review by the Authority of any arbitral award is not plenary. See 5 U.S.C. 7122. And it is unclear whether and to what extent the agency could obtain judicial review of an order of the Authority upholding an award against the agency. See page 23 note 20, *infra*.

The introduction of labor arbitrators into the contracting-out process inevitably would affect an agency's freedom to act. The grievance and arbitration procedure, followed by FLRA review, may last months or even years, thus delaying final resolution of the validity of a determination to contract out. See App., *infra*, 35a-36a. Moreover, since arbitrators normally are oriented toward compromise and solutions that will reduce labor-management friction, rather than precise interpretation of applicable provisions,[9] they may well disagree with management concerning application of Circular A-76. The problem is compounded by the fact that management necessarily uses discretion in applying the terms of the Circular. For instance, the Circular directs management to develop a "staffing estimate" of the annual productive hours necessary to accomplish an activity in-house as part of the cost analysis, but recognizes that there may be no way to make a precise estimate and that "informed judgment" is a "tool" to be used in the calculation. Supplement to OMB Circular A-76, at IV-7 (1983). As another example, management must retain in-house those commercial activities involving programs related to the direction of "national defense." 48 Fed. Reg. 37114 (1983); 44 Fed. Reg. 20558 (1979). Developing a staffing estimate or deciding whether an activity involves direction of the national defense may

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[9] See, *e.g.*, Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1487-1489, 1493-1507 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016-1024 (1955).

well involve exercise of the specialized expertise and discretion of agency managers. In view of the judgmental nature of such determinations, an arbitrator might well arrive at a different conclusion from that of the agency. Thus, while negotiation concerning agency compliance with Circular A-76 might appear at first glance to be harmless (as the court of appeals assumed), in fact it ultimately could deprive agencies of control over substantive contracting-out determinations.

b. The court of appeals concluded (App., *infra*, 8a-9a) that the union proposal would not interfere with an agency's right to make contracting-out determinations reserved under Section 7106 because the phrase "in accordance with applicable laws" in that section operates to limit the scope of reserved rights.[10] That is a misreading of the statutory language. The reference to "applicable laws" appeared in a comparable management rights provision at the inception of the original federal labor relations program created by executive order in 1962.[11] The President plainly could not have in-

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[10] The court of appeals also noted (App., *infra*, 8a) that procedures used in the exercise of management rights are negotiable under 5 U.S.C. 7106(b) and suggested (App., *infra*, 9a-10a n.12) that the union's proposal here was more procedural than substantive. The FLRA, however, did not find the proposal to be procedural in nature in the decision and order it rendered in this case, although in another, subsequent case it has referred to the proposal in this case and has characterized it as "only procedural in nature." *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (Apr. 5, 1985), slip op. 6. As we show in the text, the proposal imposes substantive criteria on management and ultimately could be read to permit arbitrators to second guess an agency's substantive contracting-out determinations. Thus, the proposal cannot be regarded as "procedural."

[11] The original management rights provision of the executive order program stated that "[m]anagement officials of the agency retain the right, in accordance with applicable laws and regulations," to exercise enumerated management rights. Exec. Order No. 10988, § 7(2), 3 C.F.R. 525 (1959-1963 comp.).

tended that language to provide a basis for limiting the exercise of management rights, particularly since there was no mechanism for binding arbitration in place in 1962.[12] The words "in accordance with applicable laws" are most naturally read as an indication that agencies were not to rely on the management rights provision as itself a source of legal authority for exercise of those rights, but were to base such activities on an independent source of authority.

It is most unlikely that Congress would have used the "applicable laws" language to create a private right of action through which unions could enforce the terms of internal management directives without express mention of such an intention. The court of appeals' reading of Section 7106 is particularly questionable in light of the fact that several courts of appeals have held that Circular A-76 and other contracting-out guidelines do not create rights that are enforceable by third parties. In *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574 (3d Cir. 1979), the court observed that the studies and evaluations on which a contracting-out decision "rested involved 'questions of judgment requiring close analysis and nice choices.' " *Id.* at 580-581 (quoting *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958)). The court therefore concluded that Circular A-76, as well as pertinent agency regulations governing contracting-out determinations, "fail[ed] to provide meaningful criteria against which a court may analyze the [agency's] decision" (602 F.2d at 581). See also *AFGE, Local 2017* v. *Brown*, 680 F.2d

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[12] See Study Committee Report and Recommendations, August 1969, *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1240-1241 (Comm. Print 1979) [hereinafter cited as *Legislative History*].

722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983) (Army's determination to contract out was "an inappropriate subject for judicial review because the decision involves military and managerial choices inherently unsuitable for the judiciary to consider"). Since disputes concerning compliance with guidelines for contracting out are considered unsuitable for judicial review, there is no reason to think that Congress would have acted sub silentio to make such guidelines enforceable through labor arbitration. Cf. *Cort* v. *Ash*, 422 U.S. 66, 82-84 (1975).

The court of appeals was untroubled by the fact that the union proposal ultimately could result in arbitration of challenges to substantive agency contracting-out determinations, because, in the court's view, such challenges were subject to the statutory grievance and arbitration procedure even in the absence of a provision in the collective bargaining agreement requiring compliance with applicable laws and regulations (App., *infra*, 11a-16a). The court's reference was to the grievance procedure that may be invoked under the Act in the case of, inter alia, "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii), 7121.

Even if the court of appeals had been correct in characterizing guidelines for contracting out as a "law, rule, or regulation affecting conditions of employment" within the meaning of 5 U.S.C. 7103(a)(9),[13] the man-

[13] Congress's reference to "any law, rule, or regulation affecting conditions of employment" in Section 7103(a)(9) should not be read to encompass guidelines for substantive decisions to shift agency operations to the private sector "purely for economic reasons." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686 (1982) (private employer's decision to terminate a part of its business was not part of the "terms and conditions of employment" as to which Congress mandated bargaining under the National Labor

agement rights provision would bar application of the statutory grievance and arbitration procedure to disputes concerning compliance with such guidelines. The explicit statement in Section 7106(a) that "nothing in this chapter" shall affect management's authority to make determinations with respect to contracting out constitutes an express limitation on the statutory grievance and arbitration procedure created by the Act.[14] As Judge MacKinnon noted in dissent, "[i]t is absurd to construe the act to say that '*nothing*' in the rest of Chapter 71 affects management's right, but that the rest of Chapter 71 *does* affect that right" (App., *infra*, 28a; emphasis in original). The majority's reading of Section 7106 would effectively nullify Congress's express reservation to management of the enumerated rights.

The court of appeals compounded its error in resting its analysis on the implicit assumption that OMB Circular A-76 qualifies as "applicable laws," within the meaning of Section 7106, or as "any law, rule, or regulation

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Relations Act). Judge MacKinnon correctly noted (App., *infra*, 29a-33a) that the term "conditions of employment" is defined under the Act as "personnel policies, practices, and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)) and that the term "working conditions" generally has been defined narrowly.

[14] The Authority itself recently concluded that a union proposal that "would extend the coverage of the negotiated grievance procedure to the decision to contract out itself * * * [is] inconsistent with [5 U.S.C.] 7106(a)(2)(B)." *AFGE, Local 225 and Dep't of the Army*, slip op. 6.

Under the pre-Act federal labor relations program it was clear that employees could not grieve "matters otherwise excluded from the negotiations by [the management rights clause of Executive Order No. 11491]." Labor-Management Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *Legislative History* 1317. There is no indication that Congress meant to change that practice when it passed the Act in 1978.

* * *," within the meaning of Section 7103(a)(9). Circular A-76, like most OMB Circulars, is an executive management policy directive issued pursuant to delegated presidential budgetary and management authority. As an internal Executive Branch management directive, the Circular is interpreted and enforced internally, ultimately through the President's authority over appointed officials (see, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926)). The court of appeals' reading of the statutory terms apparently would make arbitrators—rather than the President himself—the final arbiters of whether agencies have adhered adequately to the President's management policy directives. The result would be to transform a tool of presidential management authority into an occasion for interference by outsiders into that management process. At least in the absence of some explicit statement to the contrary in the legislative history, there is no reason to believe that Congress, in using the statutory terms construed by the court of appeals, intended to encroach on the President's authority in this manner. Compare, *e.g.*, *AFGE, AFL-CIO* v. *Carmen*, 669 F.2d 815, 822-826 (D.C. Cir. 1981).

c. The union's proposal is nonnegotiable for the additional reason that it is inconsistent with the exclusive appeals procedure prescribed by the Circular. Under the Act, 5 U.S.C. 7117(a)(1), the duty to bargain in good faith exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation;" it does not extend to "matters which are the subject of any * * * Government-wide rule or regulation." Congress intended that Circular A-76, while not a "rule" or "regulation" within the meaning of 5 U.S.C. 7103(a)(9) (see pages 17-19, *supra*), be treated as a "Government-wide rule or regulation" within the

specialized meaning of Section 7117(a)(1).[15] The union's proposal conflicts with the express provisions of the Circular (see page 12, *supra*) that its appeals procedures are to be exclusive; that agency contracting-out determinations are not to be subject to negotiation, arbitration, or agreement; and that agency decisions pursuant to the appeals procedure of the Circular shall be final. The lengthy grievance and arbitration procedures that would be introduced as a result of the union's proposal would render pointless the Circular provisions requiring expedited resolution of contracting-out disputes.[16] And if the grievance and arbitration procedures of the Act may override the appeals procedure prescribed by the Circular, contractors and their employees would no longer be represented in connection

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[15] Although executive management policy directives do not constitute "rules" or "regulations" within the ordinary meaning of those terms, the legislative history of the Act makes clear that Congress intended the phrase "Government-wide rule or regulation" to include such policy directives for the limited purposes of Section 7117. See H.R. Conf. Rep. 95-1717, *supra*, at 158 (term "rules or regulations" used in Section 7117 is to be interpreted as including "official declarations of policy of an agency which are binding on officials and agencies to which they apply"). See also *AFGE, Local 225 and Dep't of the Army*, slip op. 4 (Circular A-76 constitutes a "Government-wide rule or regulation" within the meaning of Section 7117(a)(1)); *National Federation of Federal Employees and Dep't of the Air Force, Lowry Air Force Base*, 9 F.L.R.A. 151, 154 (1982) (Congress intended that the term "Government-wide rule or regulation" used in Section 7117(a)(1) "not be confined only to those rules or regulations which meet formal requirements for notice and comment"). Congress presumably wished to make certain that the collective bargaining process would not interfere with government-wide directives, regardless of their nature.

[16] The short deadlines established by the Circular are critical to the contracting-out process, because data must be current in order for cost comparisons to be valid and because contractors normally are expected to adhere to a firm bid.

with the ultimate resolution of any dispute. See page 12, *supra*.[17]

The court of appeals disregarded these inconsistencies between the union proposal and the terms of Circular A-76, on the ground that "the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations" (App., *infra*, 16a). But the whole point of Section 7117 is that a "Government-wide rule or regulation" *does* limit the scope of rights under the Act. Section 7117 expresses Congress's intention that agencies not be required to bargain about proposals that, if incorporated into the collective bargaining agreement, would be inconsistent with a government-wide directive like Circular A-76. See H.R. Conf. Rep. 95-7117, *supra*, at 155 (Section 7117 "authorizes * * * the issuance of governmentwide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible under the provisions of this title"). Since bargaining about the union proposal in this case ultimately would introduce a form of third-party review that would be inconsistent with the terms of the Circular, Section 7117 precludes such bargaining.[18]

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[17] Under the system authorized by the decision below, the arbitrator apparently may reach a result different from that of the agency appeals procedure prescribed by the Circular. It is unclear from the decision what weight (if any) is to be given to the latter result, which normally would be available long before any arbitral proceeding was resolved.

[18] In the case of a similar conflict between the grievance procedures authorized by the Act and exclusive appeal procedures prescribed by the National Guard Technicians Act of 1968, the courts of appeals have uniformly held that the former must yield to the latter. See *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187 (7th Cir. 1983); *State of Nebraska, Military Dep't* v. *FLRA*, 705 F.2d 945 (8th Cir. 1983); *California National Guard* v. *FLRA*, 697 F.2d 874 (9th Cir. 1983); *New Jersey Air National Guard* v.

3. We recognize that there is currently no conflict among the circuits on the question presented by this petition. However, we view the decision below as of special importance to the federal government, both because of its potential threat to the integrity of the rights reserved to management under the Act and because of the precedent it appears to create for interference with the President's ability to manage the Executive Branch through written policy directives. The decision also is of concern because of the magnitude of its potential financial impact. Indeed, there is already evidence of that impact; arbitrators in several cases have ordered the rescission of agency contracting-out determinations that were alleged by unions to have violated some part of Circular A-76 or related guidelines and have awarded back pay against the agencies.[19]

FLRA, 677 F.2d 276 (3d Cir.), cert. denied, 459 U.S. 988 (1982). The National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5), provides that "[n]otwithstanding any other provision of law * * * * a right of appeal which may exist with respect to [an adverse action] shall not extend beyond the adjutant general of the jurisdiction concerned." The courts have reasoned that union proposals calling for a negotiated grievance procedure in connection with adverse actions affecting National Guard technicians were not negotiable, "since the Labor-Management Act itself provides that an agency's duty to bargain in good faith exists 'to the extent not inconsistent with any Federal law.' " *California National Guard* v. *FLRA*, 697 F.2d at 879 (quoting 5 U.S.C. 7117(a)(1)).

[19] In one case, the Navy estimates that it may be required to expend approximately $400,000 in back pay as a result of an arbitrator's order to terminate a contract and to reinstate displaced employees with full back pay and fringe benefits. See *Naval Air Station, Whiting Field, and AFGE, Local Union No. 1954*, FMCS No. 83K/06143 (Apr. 29, 1983). See also *Dep't of the Army, Oakland Army Base, and AFGE, Local 1157*, FMCS No. 83K/24072 (Nov. 26, 1984) (directing termination of contract, reinstatement of displaced employees, and back pay from date of termination to date of reinstatement); *U.S. Army Communications Command, Fort McClellan, and Local No. 1941, AFGE*, FMCS No. 83K/00570 (Aug. 9, 1983) (ordering agency to cease and

Moreover, there is some uncertainty whether the government will be able to obtain review of future arbitral awards entered on the authority of the decision below.[20] We therefore believe that review by this Court is warranted at this time.

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desist from contracting out telephone services and implementing reduction in force pending proper notification to union and to reinstate any displaced employees); *U.S. Army Communications Command Agency—Redstone Arsenal, and AFGE, Local 1858*, FMCS No. 83K/05094 (May 16, 1983) (contract must be cancelled until agency complies with arbitrator's interpretation of collective bargaining agreement provisions involving provision of documents to union); *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, and AFGE, Local No. 2840*, FMCS No. 82K/20840 (Aug. 9, 1982) (ordering cancellation of procurement action). Exceptions to these awards have been filed with the FLRA, but the Authority has not yet ruled on any of the exceptions.

We are lodging with the Clerk of the Court and providing to counsel for respondents copies of the cited arbitral decisions.

[20] Under 5 U.S.C. 7123(a), not all orders of the Authority on exceptions to arbitral awards are reviewable. The decision of the Ninth Circuit in *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (1983), has created uncertainty about the extent to which an agency may obtain judicial review of the Authority's order affirming an arbitral award alleged to infringe on a reserved management right. See *Andrade* v. *Lauer*, 729 F.2d 1475, 1485 & n.16 (D.C. Cir. 1984); App., *infra*, 35a-36a n.17. If further judicial review of this issue were foreclosed, a conflict among the circuits could never arise.

A case involving the negotiability of a bargaining proposal that would require correction of in-house estimates that are not prepared in accordance with existing contracting-out directives is currently pending in the Ninth Circuit. *Defense Language Institute* v. *FLRA*, Nos. 84-7498 and 84-7610 (argued Mar. 11, 1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

V.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ETC., INTERVENOR

Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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Argued October 26, 1983
Decided September 21, 1984

Before WRIGHT and TAMM, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* TAMM.

Dissenting opinion filed by *Senior Circuit Judge* MACKINNON.

TAMM, *Circuit Judge*: This is an appeal from a decision of the Federal Labor Relations Authority (the Authority) ordering petitioner Equal Employment Opportunity Commission (EEOC) to bargain over a union contract proposal that requires compliance with applicable laws and regulations regarding "contracting-out." EEOC contends that it has no duty to bargain because the proposal concerns a subject exclusively reserved to management. The Authority has cross-petitioned for

enforcement. For the reasons stated below, we enforce the Authority's order.

I. BACKGROUND

A. *Statutory Framework*

Title VII of the Civil Service Reform Act of 1978 (the Act), 5 U.S.C. §§ 7101-7135 (1982), substantially revised labor-management relations in the federal sector. The Act was designed to balance the right of federal employees to engage in concerted activity with the need of federal managers to achieve an "effective and efficient [federal] Government." 5 U.S.C. § 7101(b). To administer the Act and establish labor-management relations policy, Congress created the Federal Labor Relations Authority. The Authority's responsibilities include resolving issues relating to the duty to bargain.

The Act established a system of collective bargaining that requires federal agencies and employee unions to bargain in good faith "with respect to . . . conditions of employment." 5 U.S.C. § 7103(12). The term "conditions of employment" is expansively defined in the Act as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(14).

This broad duty to bargain is subject to certain limitations. Specifically, the Act contains a management rights clause that reserves certain prerogatives to management. 5 U.S.C. § 7106(a). Most important, for this case, the management rights clause reserves to management the authority "to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). The procedures used in exercising these reserved management rights are subject to negotiation. 5 U.S.C. § 7106(b).[1]

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[1] Section 7106 provides in pertinent part:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> . . . .

B. *The Facts*

The facts in this case are undisputed. During contract negotiations with the EEOC, the union[2] advanced the following proposal:

> "The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out."[3]

Joint Appendix (J.A.) at 2. EEOC declared the proposal nonnegotiable and refused to bargain over it. To

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(2) in accordance with applicable laws—

. . . .

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

. . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

. . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section;

. . . .

5 U.S.C. §§ 7106(a)(2)(B), (b)(2).

[2] The union, intervenor in this appeal, is the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals.

[3] OMB Circular A-76 (the Circular) prescribes guidelines for determining whether the goods and services needed by the federal government should be acquired from the private sector or obtained "in-house" with government facilities and personnel. Joint Appendix (J.A.) at 37. The Circular specifies that the government generally should acquire its goods and services from private enterprise if it is cost-effective. The Circular contains a Cost Comparison Handbook outlining procedures to be followed in determining whether contracting-out is most cost-effective. Since the petition in this case was filed, OMB Circular A-76 has been revised. The revision in no way affects the issues before us.

resolve the dispute, the union filed a petition for review with the Authority. J.A. at 1.[4]

EEOC argued before the Authority that the union proposal was nonnegotiable primarily for two reasons.[5] First, it contended that the proposal conflicted with the Act's express reservation to management of the right "to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). Second, the EEOC argued that OMB Circular A-76 (the Circular) itself prohibited negotiation over the proposal.[6] J.A. at 12-13.

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[4] 5 U.S.C. § 7105(a)(2)(E) provides that the authority shall "resolve[] issues relating to the duty to bargain." The Act further provides that "if an agency involved in collective bargaining . . . alleges that the duty to bargain in good faith does not extend to any matter, the [union] may appeal the allegation to the Authority." 5 U.S.C. § 7117(c)(1). The Authority is required to issue a written decision containing reasons for its determination. If the Authority concludes that the disputed issue is within the scope of the duty to bargain, it orders the agency to bargain in good faith. The Authority does not, however, address the merits of the proposal. See Library of Congress v. FLRA, 699 F.2d 1280, 1284 (D.C. Cir. 1983).

If a proposal is determined to be within the duty to bargain, the parties must negotiate, although they may adhere to a particular position to the point of impasse. If an impasse is reached, the parties may refer the dispute to the Federal Service Impasses Panel. 5 U.S.C. §§ 7119(b), (c).

[5] In addition to the two arguments noted here, the agency also asserted that the proposal fell outside the scope of the duty to bargain because it involved matters that do not directly affect conditions of employment. The FLRA's decision did not address this contention. American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982). Since the EEOC did not raise this argument in its petition to this court, we will not discuss the issue.

[6] The Circular provides that its text "shall not be construed to create[] any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with [this] Circular, except as specifically set forth in [this Circular]." J.A. at 37. The Circular further di-

On September 2, 1982, the Authority issued a decision holding that the union proposal was a mandatory subject of bargaining. *American Federation of Government Employees, AFL-CIO National Council of EEOC Locals and Equal Employment Commission*, 10 FLRA 3 (1982). The Authority concluded that the proposal did not impair EEOC's statutory right to make contracting-out decisions because it recognized only existing limitations on EEOC's power. By its terms, ruled the Authority, the proposal established no substantive limitations on management discretion. *Id.*

The Authority further concluded that the proposal was not rendered nonnegotiable by the terms of the Circular. EEOC apparently asserted that adoption of the proposal would result in subjecting all contracting-out disputes to the negotiated grievance procedure, thus conflicting with the Circular's intent to allow EEOC to resolve such disputes internally.[7] The Authority rejected EEOC's underlying assumption that contracting-out disputes are not grievable in the absence of the proposed contract language. 10 FLRA at 4-5. Rather, the Authority found that such disputes were already grievable under section 7121 of the Act and that the Circular alone could not limit the *statutorily* prescribed scope of the grievance proce-

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rects agencies to develop procedures for an informal review of determinations made pursuant to its provisions and states that those procedures and agency determinations are not subject to negotiation or arbitration. J.A. at 50.

[7] This argument is not expressly articulated in the EEOC's statement of position before the Authority. We therefore rely on the Authority's characterization of the agency's position. *See* American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA at 4-5 (1982).

dure.[8] 10 FLRA at 4-5. Concluding that the contract proposal was not prohibited by either the Act or the Circular, the Authority ordered EEOC to bargain. *Id.* at 5.

EEOC filed a timely petition for review in this court.[9] The FLRA filed a cross-petition for enforcement. We have jurisdiction pursuant to 5 U.S.C. § 7123.[10]

II. STANDARD OF REVIEW

The Act provides that the Authority's rulings are reviewable in accordance with section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982). *See* 5 U.S.C. § 7123(c) (1982). The Authority's determinations will thus be upheld "if they are supported by substantial evidence[,] . . . are not arbitrary, capricious, or an abuse of discretion[,] and are otherwise in accordance with law." *National Treasury Employees Union v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983). Review is further circumscribed where, as here, the Authority has construed its enabling legislation. Indeed, the Au-

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[8] 5 U.S.C. § 7121(a) requires all collective bargaining agreements to include a system for settling grievances. The negotiated grievance procedure must provide for binding arbitration for grievances not settled through the procedure. 5 U.S.C. § 7121(b)(3)(C). "Grievance" is broadly defined in the Act as any complaint concerning employment, the terms of a collective agreement, or the interpretation of any law, rule or regulation affecting conditions of employment. 5 U.S.C. § 7103(a)(9).

[9] EEOC filed a request for reconsideration with the Authority on September 16, 1982. J.A. at 64. On March 18, 1983, the Authority issued an order denying the EEOC's request. Brief for Federal Labor Relations Authority at C-1.

[10] 5 U.S.C. § 7123(a) provides that "[a]ny person aggrieved by any final order of the Authority . . . may . . . institute an action for judicial review of the Authority's order . . . in the United States Court of Appeals for the District of Columbia." The Authority may petition any appropriate United States court of appeals for enforcement of any of its orders. 5 U.S.C. § 7123(b).

thority is entitled to "considerable deference" when interpreting and applying the Act's provisions to specific situations. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 104 S. Ct. 439, 444 (1983). Accordingly, we will uphold the Authority's interpretation of the Act if it is "reasonably defensible," *Department of Defense v. FLRA*, 659 F.2d 1140, 1162 n.121 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 104 S. Ct. at 444 (1983), and not inconsistent with any congressional mandate or policy.[11]

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[11] The dissent contends that the Act's reservation to management of the right to contract-out is a limitation on the Authority's power to direct labor-management relations. Consequently, argues the dissent, the Authority's interpretation of the scope of management's reserved rights is not entitled to great deference. The dissent ignores the fact that the dispute here concerns the negotiability of a specific proposal. Congress has expressly entrusted to the Authority the power and the obligation to resolve all such disputes. *See supra* note 4. Decisions in this circuit have uniformly recognized that the Authority, and not the court, must exercise the judgment necessary to determine whether a proposal that allegedly violates management's rights is bargainable. "[T]he distinction between proposals encroaching on management's nonnegotiable substantive authority and those concerning properly negotiable procedural matters [is] primarily to be made by the Authority in an exertion of its expertise . . . ." National Treasury Employees Union v. FLRA, 691 F.2d 553, 561 (D.C. Cir. 1982) (footnote omitted) (citing Department of Defense v. FLRA, 659 F.2d 1140, 1161 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982)).

The dissent's reliance on Vanguard Interstate Tours, Inc. v. ICC, 735 F.2d 591 (D.C. Cir. 1984), is misplaced. In the statute at issue in *Vanguard*, Congress expressly limited the discretion previously granted to the ICC and set out the precise criteria governing the issue in the case. Here, in contrast, Congress has expressly delegated to the Authority the task of resolving issues relating to the duty to bargain. We therefore conclude that even if the management rights clause acts as a limitation on the power of the Authority, the Authority's exercise of its expertise primarily to determine whether an issue in a particular case is negotiable is entitled to deference.

III. ANALYSIS

EEOC asserts that the Authority improperly construed the terms of the management rights clause, as well as the probable effect of the disputed proposal. EEOC suggests first that the plain text of the management rights clause insulates from collective bargaining *all* proposals regarding contracting-out. Second, EEOC contends that the proposal is nonnegotiable because its adoption would subject contracting-out decisions to the statutorily prescribed grievance procedure, thus infringing on EEOC's reserved authority to make contracting-out decisions. Finally, EEOC argues that the proposal is inconsistent with the Circular.

A.

EEOC asserts that the management rights clause gives management unfettered authority to make contracting-out determinations. Apparently assuming that any proposal regarding contracting-out will restrict this authority, EEOC suggests that the management rights clause renders nonnegotiable *all* proposals regarding contracting-out.

EEOC's argument is untenable in light of the plain text of the clause. The management rights clause provides that "nothing in [Title VII] shall affect the authority of any management official of any agency—. . . in accordance with applicable laws—. . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). This language plainly restricts the authority reserved to management by requiring that it be exercised "in accordance with applicable laws." In addition, section 7106(b) provides that procedures used to exercise rights are negotiable. *See supra* note 1. Because the Act does not grant to management unqualified authority to contract-out, union proposals touching upon that authority are not automatically rendered nonnegotiable. Rather, management may refuse to bar-

gain over only those proposals that would expand upon the restrictions contained in the Act. *See infra* note 12.

The union proposal here suggests contract language that essentially echoes the statutory requirement that contracting-out determinations be made in accordance with applicable laws. Any restriction imposed by the proposal on management's contracting-out authority thus stems from the Act's mandate. EEOC, of course, must comply with these requirements regardless of whether the proposal is adopted as part of the collective agreement. The union proposal at issue here thus does not of itself establish any substantive criteria guiding management's contracting-out determinations. We therefore agree with the Authority's conclusion that the proposal does not affect management's reserved authority, within the meaning of the statutory language, to make contracting-out decisions.[12]

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[12] The precise scope of management's reserved authority is difficult to define. In previous rulings, the Authority has effectively defined the protection accorded management by classifying proposals as either negotiable procedures under section 7106(b) or nonnegotiable substantive rights. To distinguish between the two, the Authority has developed a "direct interference" test. Under this test, a proposal involves a nonnegotiable substantive right if it would "directly interfere" with management's ability to make the relevant determination. We have repeatedly affirmed the Authority's use of this test. *See* Department of Defense v. FLRA, 659 F.2d 1140, 1159 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). Although in the present case the Authority did not expressly classify the proposal as procedural and did not explicitly apply the direct interference test, the analysis used was quite similar. In concluding that the proposal was negotiable, the Authority focused on the agency's retention of the full degree of discretion that exists in the absence of the proposal. We find this analysis fully acceptable as a guideline to determine the scope of substantive rights reserved to management.

The dissent misconstrues both the direct interference test and the import of our conclusion here. The direct interference test is essentially definitional. It determines whether a particular pro-

EEOC points to no expression of intent in the legislative history that contradicts this conclusion. Though far from conclusive, the legislative history indicates that the management rights clause should not be interpreted to negate the Act's broad duty to bargain. In adopting the management rights clause, Congress sought to reserve to management the authority necessary to achieve an effective and efficient government. At the same time, however, Congress intended to broaden the scope of bargaining beyond that sanctioned under the previous labor-management relations system.[13] Thus, as one member explained, the clause was designed to protect "genuine managerial prerogatives."[14] Indeed, Congress directed that the clause was to "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal."[15]

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posal is in fact substantive and therefore nonnegotiable. Although the Authority did not expressly apply this test here, it did use the same functional analysis: only proposals that limit substantively management's contracting-out determinations involve nonnegotiable rights. Implicit in the Authority's opinion is the conclusion that the disputed proposal represents more of a procedural than a substantive limitation on management's right to contract-out.

[13] H.R. REP. NO. 1403, 95th Cong., 2d Sess. 43 (1978), *reprinted in* House of Representatives Committee on Post Office and Civil Service, 96th Cong., 1st Sess. Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 [hereinafter cited as Legislative History] at 689 (1979); *see* National Treasury Employees Union v. FLRA, 691 F.2d 553, 559 (D.C. Cir. 1982).

[14] 124 CONG. REC. 29,199 (1978) (remarks of Rep. Ford), *reprinted in* Legislative History at 956.

[15] H.R. REP. NO. 1403, 95th Cong., 2d Sess. 44 (1978), *reprinted in* Legislative History at 690. The management rights clause that appears in the Act was adopted as an amendment on the House floor to the clause reported by the House Committee on Post Office and Civil Service. This amendment, however, did not change the purpose behind the clause as explained in the report accompanying the Committee version of the bill. "This substitute

In sum, neither the text nor the legislative history mandates a conclusion other than that reached by the Authority. We cannot say, therefore, that the Authority acted arbitrarily in concluding that the proposal does not affect EEOC's reserved rights. We reject EEOC's argument that the management rights clause renders the proposal nonnegotiable.

B.

EEOC argues that even if the text of the proposal does not impose additional restrictions, its adoption would effectively hinder EEOC's ability to make contracting-out decisions. Specifically, EEOC contends that the proposal would invade its reserved management rights by making compliance with the Circular a contractual prerequisite of any decision regarding contracting-out. The union could then challenge EEOC's decisions to contract-out by alleging that EEOC violated the collective agreement in failing to comply with appropriate procedures. Any contracting-out decision would then be subject to grievance procedures and ultimately to arbitral review. According to EEOC, contracting-out decisions could thus become the prerogative not of management, but of the arbitrator. In this way, EEOC implies, the union would be able to achieve precisely what the management rights clause was intended to prevent.

EEOC's argument assumes that a complaint asserting that a contracting-out determination was not

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[the amendment that was adopted on the floor] strengthens the 'Management rights' section reported by the Committee, but it is still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." 124 CONG. REC. 29,183 (1978), *reprinted in* Legislative History at 924. The amendment adopted on the House floor was adopted by the House-Senate Conference Committee without change. H.R. REP. NO. 1717, 95th Cong., 2d Sess. 153-54 (1978) (Conference Report), *reprinted in* Legislative History at 821-22.

made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal. This assumption, however, is contrary to the text of the Act.

The Act expansively defines the subjects covered under the statutory grievance procedure. Grievances include complaints concerning "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" as well as complaints "concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9).[16] Only five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism.[17] An allegation that the EEOC failed to comply with the OMB Circular, or

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[16] 5 U.S.C. § 7103(a) (9) provides in full:

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

[17] The [sections requiring a grievance procedure] shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. § 7121(c)

with any other law or rule governing contracting-out, plainly falls within this expansive definition.[18]

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[18] The dissent contends that a complaint asserting a failure to comply with the Circular does not fall within the statutory definition of grievance. Because the Act defines grievance to include claims alleging violations of regulations "affecting conditions of employment," and because "conditions of employment" is in turn defined as "matters affecting working conditions," the dissent maintains that grievances are restricted to claims involving surroundings and hazards.

The dissent's narrow definition of "working conditions" does not apply in the context of this Act. The definition of working conditions as hazards and surroundings derives from Corning Glass Works v. Brennan, 417 U.S. 188, 201-03 (1974), a case construing the language of the Equal Pay Act. The Court in *Corning Glass Works* based its definition of the term "working conditions" on Congress's intent as expressed in an extensive discussion of the term in the legislative history of the Equal Pay Act. The Court noted that "working conditions" has a generally accepted meaning in the "specialized language of job evaluation systems." 417 U.S. at 202. A definition adopted in the context of a specific statute and in light of a detailed legislative history, however, is not immediately transferable to this case. *See* Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595, 600 n.7 (D.C. Cir. 1981). The legislative history of Title VII nowhere indicates that Congress intended such a restriction on the rights granted employees. Indeed, the Authority has consistently adopted, with this court's sanction, a *broad interpretation* of the phrase "conditions of employment." *See* Department of Defense v. FLRA, 685 F.2d 641, 647-48 & n.3 (D.C. Cir. 1982); National Treasury Employees Union and Internal Revenue Service, 3 FLRA No. 112 at 693, 695 (1980) (conditions of employment concerns working situation and employment relations of bargaining unit employee). Moreover, as the dissent itself notes, the term "conditions of employment" includes personnel policies and practices as well as matters affecting working conditions. *See* Dissent at n.12. Even if the phrase "matters affecting working conditions" comprises only hazards and surroundings, contracting-out decisions, which ultimately may result in a layoff, undoubtedly fall under the umbrella of personnel policies or practices.

In addition, we note that the dissent's restrictive definition applies only to grievances defined in section 7103(a)(9)(C)(ii) as violations of regulations affecting conditions of employment. The dissent's analysis, of course, does not apply to grievances defined in

EEOC maintains, however, that in addition to the five subjects expressly designated in section 7121 of the Act, all prerogatives reserved to management under the management rights clause are excluded from the scope of matters grievable. EEOC asserts that because the management rights clause provides that "*nothing in this chapter* shall affect" management's authority to contract-out, such decisions are removed from grievance procedures. 5 U.S.C. § 7106(a) (emphasis added). A grievance alleging noncompliance with the Circular, however, does not affect management's substantive authority, within the meaning of the statutory language, to contract-out. Rather, it provides a procedure for enforcing the Act's requirement that contracting-out decisions be made in accordance with applicable laws.[19] Any substantive limitation on management's authority stems from the externally established criteria contained in the Circular. *See supra* text accompanying note 12. We therefore find that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause.[20]

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sections 7103(a)(9)(A) or (B) as any matter relating to the employment of an employee. A claim that work was improperly contracted out surely falls within this definition of grievance.

[19] The dissent maintains that grievances alleging a failure to comply with applicable laws regarding contracting-out will affect management by delaying implementation of a decision. Of course, any review of an agency decision, whether conducted by the courts or through a contractual grievance mechanism, may cause some delay. This court has previously recognized that a proposal that may result in delay, including delay created by the arbitral process, need not infringe management's reserved authority, and may thus be negotiable. *See* Department of Defense v. FLRA, 659 F.2d at 1153-58.

[20] Our reading of the text of the Act is supported by the legislative history. Congress unambiguously stated that the management rights clause, at least in one instance, does not affect an employee's right to enforce the Act's requirement that management exer-

The statutorily defined grievance procedure therefore encompasses a claim that a contracting-out determination was not made in accordance with law. EEOC's initial assumption that including the proposal in the collective bargaining agreement would expose for the first time EEOC's contracting-out determinations to employee grievance challenges, and arbitral review, is contradicted by the plain text of the Act. We thus conclude that adoption of the proposal in no way expands an employee's right to challenge management's contracting-out decisions under the grievance proce-

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cise its reserved right in accordance with applicable laws and regulations.

> [M]anagement has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management rights to "remove" would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement.

124 CONG. REC. 29,183 (1978), *reprinted in* Legislative History at 924. Similarly, we believe that EEOC's reserved right to make determinations regarding contracting-out does not insulate EEOC from challenges, through the grievance mechanism, asserting violations of applicable laws or regulations. *Cf.* National Treasury Employees Union v. FLRA, 691 F.2d 553, 564-65 (D.C. Cir. 1982) (noting that although establishment of performance standards is encompassed within management's reserved rights, employees may challenge those standards in grievance proceedings).

The dissent suggests that this conclusion requires us to construe the statutory grievance mechanism as an applicable law with which management must comply. This construction, suggests the dissent, does not comport with the statutory language which states that "nothing in Title VII shall affect" management's authority to make determinations regarding contracting-out. We do not determine here whether the section 7121 grievance mechanism is an "applicable law." Rather, we conclude only that a grievance alleging that management has not complied with externally established criteria does not affect management's reserved substantive authority.

dure.[21] Accordingly, we reject EEOC's contention that the proposal will impair its management rights by making compliance with the Circular a contractual prerequisite of contracting-out decisions.

C.

Finally, EEOC argues that the language of the OMB Circular renders the proposal nonnegotiable. As noted, the Circular states that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself. J.A. at 37. EEOC maintains that the Authority's ruling that the proposal is negotiable conflicts with the Circular's limiting language because it allows alternative enforcement actions through the grievance mechanism. Two considerations compel us to reject this argument.

First, the proposal is not inconsistent with the Circular's limiting language. The proposal does not "create" any new right of appeal. Rather, as we have already determined, the right to file grievances regarding contracting-out decisions is created by the Act.

Second, and more important, the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations. There is no indication in the Act or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure. To allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co. v. NLRB*, 338 U.S. 355,

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[21] The scope of the grievance procedure can of course be limited in negotiation. We address here only the *statutorily* defined grievance procedure.

363 (1949). Accordingly, we reject EEOC's argument that the Circular bars negotiation over the proposal.[22]

IV. CONCLUSION

For the reasons stated herein, we conclude that the Authority's interpretation should be upheld and that its order should be enforced.

Judgment accordingly.

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[22] EEOC also argues that section 7117(a)(1) of the Act, which prohibits bargaining over matters that are inconsistent with other laws, limits the matters subject to grievance procedures. 5 U.S.C. § 7117(a)(1). EEOC asserts that bargaining over contracting-out is inconsistent with the management rights clause and therefore contracting-out determinations are excluded from the grievance mechanism. Reply Brief for Petitioner at 5. EEOC's assertion that the proposal at issue in this case is inconsistent with other law is derivative in nature. EEOC contends the proposal is inconsistent with the management rights clause. We have already stated, however, that the management rights clause does not, on its face, render this proposal nonnegotiable. The proposal cannot be "inconsistent with other law" if it is not inconsistent with the management rights clause.

MACKINNON, *Senior Circuit Judge*, dissenting: Because I believe that the majority opinion seriously misreads the statute which controls this case, I consider it my duty to dissent. The opinion of the majority holds that the EEOC must bargain over a proposal which, under the Federal Labor Relations Authority's (FLRA's) interpretation of the statute, is a total nullity. The majority holds that incorporation into the collective bargaining agreement of a promise to comply with applicable regulations, including OMB Circular A-76, does require that all "contracting-out" decisions be subject to grievance determinations, but that such a provision affects neither management's authority to contract out nor the existing union remedies for violations of that regulation.[1]

The FLRA essentially held that (1) management has a right to make determinations regarding contracting out; (2) such determinations must be made in accordance with applicable regulations; (3) violations of such regulations are *already grievable* under the Civil Service Reform Act of 1978 without regard to the necessity of making them grievable in a collective bargaining agreement; and thus (4) a provision in a collective bargaining agreement requiring adherence to such regulations does not infringe the agency's specific, existing right to "contract out" because it does not make nongrievable matters grievable. The essential flaw in the

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[1] The FLRA has previously held that a proposal which purported to bind an agency to the specific terms of Circular A-76 as of the date of the proposal—thus, in effect, prohibiting the government from subsequently changing the regulation—was nonnegotiable. *See* National Federation of Federal Employees, Local 1167, 6 F.L.R.A. 574, 577 (1981). In the instant case, the language at issue ("The [agency] agrees to comply with OMB Circular A-76") can also be read, like that in *Local 1167*, to require compliance with the *present* terms of the Circular. The FLRA, however, apparently has interpreted the proposal only to require the agency to comply with the Circular as it is amended from time to time.

FLRA's reasoning—and the one adopted by the majority—is that, contrary to its assertion, violations of Circular A-76 and other regulations regarding *substantive* contracting-out decisions are *not* statutorily grievable. Hence, inclusion in a collective bargaining agreement of a promise to comply with the Circular's terms would permit the union to seek arbitration on issues that are *not* now grievable, and would create arbitral review of determinations specifically entrusted by Congress to the EEOC and all other federal agencies. This far-reaching decision potentially affects *every* non-exempt federal agency.

The union plainly recognizes this; why else does it seek so strenuously to impose a collective bargaining provision that—the majority implicitly asserts—gives it nothing it did not already possess? Far from being a nullity, the decision of the majority seriously infringes on the authority, specifically reserved to the EEOC and all other agencies by Congress, "to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(E).

I. STANDARD OF REVIEW

The majority recognizes that "[r]eview of the Authority's order shall be on the record in accordance with [5 U.S.C. § 706]." 5 U.S.C. § 7123(c). Section 706 provides.

> The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law;* [or]
>
> . . .
>
> (C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right* . . . .

(Emphasis added.) Thus, the standard of review for FLRA decisions was spelled out recently by Justice Brennan in *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 104 S. Ct. 439, 444 (1983):

> Like the National Labor Relations Board, ... the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act.... Consequently, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations....
>
> On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." ... Accordingly, *while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, ... they must not "rubber stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."*

(Emphasis added.) Applying this standard, the Court unanimously reversed the FLRA's own construction of its enabling statute. The same principle calls for reversal here.

Courts should be especially cautious about giving undue deference to agency construction of enabling legislation when the particular provision being construed is one designed to act as a *limitation* on the agency. As this court recently pointed out,

> When Congress' intent is to delegate to the agency the task of supplying the meaning of the statutory standard in question, we are bound to accept the agency view if it is not arbitrary or capricious or inconsistent with underlying congressional intent. *When Congress has not delegated this function to*

> *the agency, we must undertake full interpretive responsibility ourselves, and we look to the agency view as a relevant, but not controlling, principle.* It remains for this court initially to exercise its responsibility to interpret the statute to determine whether Congress delegated the definitional function to the agency.

Vanguard Interstate Tours v. ICC, 735 F.2d 591, 596 (D.C. Cir. 1984); *Trailways, Inc. v. ICC*, 727 F.2d 1284, 1288 (D.C. Cir. 1984).

If Congress intended a particular provision to *limit* the authority of an agency, deferring to an agency decision which eviscerated that provision would foil that legislative intent. When Congress limits the discretion of an agency, a court is remiss if it permits the agency to circumvent that limitation through construction of the statute.[2] It is doubly remiss if in doing so it violates a clear grant of specific management discretion to another agency.

In Chapter 71 of Title 5 ("Labor-Management Relations"), which creates the FLRA, Congress specifically provided that "nothing in [Chapter 71] shall *affect* the authority of any management official of any agency ... in accordance with applicable laws ... to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B) (emphasis added). This specific recognition of authority in all federal agencies affirmatively

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[2] In Department of Justice v. FLRA, 709 F.2d 724, 729-30 (D.C. Cir. 1983), the FLRA tried to require bargaining by an agency over procedural protections for probationary employees. (The right to dismiss probationary employees is reserved to management under provisions in other parts of U.S.C. Title 5.) This court refused to defer to the agency's construction of the labor relations provisions at issue. But in AFGE, Local 2953 v. FLRA, 730 F.2d 1534, 1547-48 (D.C. Cir. 1984), we affirmed the agency's decision that a proposal requiring National Guard units to ignore military efficiency when implementing reductions-in-force was *non*-bargainable.

denies to the FLRA any authority to "affect" the authority of an agency to "contract out." An FLRA decision which encroached on this specifically recognized power would thus violate the plain intent of Congress. Since Congress cannot have intended to give the FLRA discretion to erode the limitations it specifically placed on that Authority by statute, it cannot have intended that courts give great deference to the FLRA's construction of such limitations.[3] To the extent, then, that the FLRA's decision exceeds its "statutory jurisdiction, authority, or limitations," 5 U.S.C. 706(2)(C), it is not entitled to deference. This court "must undertake full interpretive responsibility [itself], and ... look to the agency view as a relevant, but not controlling, principle." *Vanguard Interstate, supra*, 735 F.2d at 596.

II. ANALYSIS

Although the majority asserts that the plain language of the relevant statutory provisions supports *its* construction, *see* Maj. at 9, 16, the relevant language points plainly to exactly the opposite interpretation.

A.

Section 7106 provides:

> (a) Subject to subsection (b) of this section, *nothing in this chapter shall affect the authority of any management official of any agency—*

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[3] The majority relies for its highly deferential stand—*see* Maj. at n.11—on National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982), in which the Authority, with scrupulous concern for the limitations imposed on it by Congress, held that it could *not* order bargaining over a particular proposal without infringing on management rights. This court deferred to the Authority's interpretation. But that decision does *not* require us to uphold the Authority's use of its interpretative power to emasculate specific Congressional restrictions on its authority.

(1) to determine the mission, budget, organization, *number of employees*, and internal security practices of the agency; and

(2) in accordance with applicable laws—

. . .

(B) to assign work, *to make determinations with respect to contracting out*, and to determine the personnel by which agency operations shall be conducted . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) *at the election of the agency*, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, *work project*, or tour of duty, or on the technology, methods, and means of performing work;

(2) *procedures* which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate *arrangements* for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7106 (emphasis added). In other words, this section of the Act on its face specifically provides that *nothing* in Chapter 71 can circumscribe management's authority to make decisions regarding contracting-out, *except* for the limitations in § 7106(b). Subsection 7106(b) provides that management may negotiate (1) "*procedures* which . . . the agency will observe in exercising [its reserved] authority," (2) "appropriate *arrangements* for employees adversely affected by the exercise of [such] authority" (emphasis added), and (3) at its election, assignment of employees to particular work projects and the means of carrying out such projects.

Significantly, the FLRA did *not* attempt to construe the contract proposal at issue as relating to "procedures . . . the agency will observe" in implementing its

contracting-out decisions, a fact which the majority recognizes. *See* Maj. at n.12. Indeed, it is difficult to comprehend how OMB Circular A-76 *could* fit under the provisions of § 7106 (b). The purpose and scope of that Circular are spelled out in its first paragraph:

> *Purpose.* This Circular establishes Federal policy regarding the performance of commercial activities. The Supplement to the Circular sets forth procedures *for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.*

OMB Circular No. A-76 (rev. Aug. 4, 1983) (emphasis added). In other words, the Circular and its accompanying Supplement are designed to offer guidance to agencies in making the decision to contract out—*i.e.*, to provide *substantive policy-making criteria*—not procedures for carrying out decisions already made. If (1) the Circular provides substantive criteria for contracting out, and (2) bargaining over substantive criteria for contracting out is prohibited by law, then (3) a collective bargaining proposal which purports to *require* an agency to meet substantive criteria is *not* negotiable. It therefore does not appear that the FLRA *could* rationally have based its decision on the "procedures" provision of § 7106(b). In any event—even assuming that the language could be twisted into supporting that position—the FLRA did not do so, and this court is prohibited from relying on a ground not advanced by the agency. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507, 522 n.9 (1977) (*Chenery* rule "has not been disturbed" by subsequent decisions).

The majority attempts to escape this problem by arguing that, while the FLRA did not specifically find that this provision was procedural, it nevertheless used "similar" analysis to that used in cases involving procedures, *i.e.*, its "direct interference" test. Maj. at n.12. The simple answer to this is that a test for determining the validity of *procedural* provisions is entirely irrelevant to the validity of *substantive* restrictions. Under § 7106, restrictions on *procedures* which indirectly affect contracting-out by management may well be proper because they fall within § 7106, but *non-procedural* restrictions which affect that *right*—whether directly *or* indirectly—are clearly not.

Moreover, the limited scope of the term "procedures" in subsection (b)(2) is emphasized by subsection (b)(1), in which Congress provided for bargaining over "the employees or positions assigned to any ... work project, ... or on the ... methods, and means of performing work," but *only* "at the election of the agency." Congress recognized the right of any agency to elect to bargain on some subjects that are not mandatory. Congress' specific treatment of *work projects* belies the majority's construction of the statute.[4] It makes little sense to suggest that "contract[ing] out" any specific work project is a mandatory subject of negotiation when this subsection clearly provides that negotiation on "any work project" is "at the election of the agency."

It may be that the key to the majority's opinion is its footnote 12. Although the Authority itself did not hold

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[4] Congress did not define the term "work project" in the Act. By analogy to the term "project works," however, a "work project" may be considered to be a project that constitutes a *part* of the agency's complete work load. *See* Ontario Land Dev't & Beach Protection Ass'n v. FPC, 212 F.2d 227, 232 (D.C. Cir. 1954); *cf.* Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 401 (1975) (Congress recognized in definition that "project works" were limited to part of a whole project).

that the proposal at issue was only "a procedure" under § 7106 (b), the majority finds in that footnote that the proposal really *is* merely procedural, and hence the management rights provisions do not apply at all.[5] But neither the Authority's opinion—despite the majority's divination of what that agency meant but did not say—nor the language and history of the statute lends any support to the notion that requiring compliance with substantive decision-making criteria, and subjecting such substantive decisions to arbitral review, is nothing more than a "procedure" for exercising authority to contract out.

B.

The majority, however, does not attempt to rely solely on a *sua sponte* finding that the provision at issue is procedural. Instead, it rests heavily on another limitation it finds in § 7106: the requirement that decisions regarding contracting-out be made "in accordance with applicable laws." The majority perforce construes this to mean "in accordance with the other provisions of Chapter 71."

It should first be pointed out that the FLRA in its opinion did not offer this interpretation of the statute as a basis for its decision, and thus the majority is not only speculating in relying on this as a ground, but is also ignoring the principles of *Chenery*, *supra*. The FLRA, in fact, heretofore has recognized that substantive decisions regarding management rights are *not* reviewable under the grievance procedure:

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[5] If this is, in fact, what the majority is holding, then footnote 12 probably renders the remainder of the majority's opinion— particularly its discussion of the phrase "in accordance with applicable laws"—mere verbiage, because it is crystal clear that "procedures" for carrying out decisions are not within the management rights clause.

> Under the plain language of section 7106(a), of course, "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated therein. Hence, no matter could be grieved under a procedure negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106.

AFGE Local 2782, 6 F.L.R.A. 314, 319-21 (1981) (footnote omitted). There is no suggestion in *Local 2782* that the phrase "in accordance with applicable laws" can be used to permit grievance review of non-negotiable *substantive* decisions.[6]

But even assuming that the FLRA had proffered this interpretation,[7] it could not withstand scrutiny. Con-

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[6] The FLRA's decision in *Local 2782* dealt with a proposal for repromoting individuals who had been reduced in grade due to management cutbacks. It was not a case where substantive regulations were involved; the FLRA carefully pointed out, 6 F.L.R.A. at 321, that it involved simply "appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a)," which are negotiable under the explicit provisions of 5 U.S.C. § 7106(b)(3).

[7] This interpretation arguably was advanced by the FLRA in National Federation of Federal Employees, Local 1497, 9 F.L.R.A. 151 (1982). In that case, the union proposed that "[w]ork assignments shall not be in violation of prohibited personnel practices nor any relevant law, rule, or regulation." The right to assign work is one of the management rights reserved under § 7106(a). The FLRA held that since the agency was required to exercise its management rights "in accordance with applicable law," a contract provision binding it to do so did not interfere with its rights. 9 F.L.R.A. at 156. Implicit in this determination is the assumption that a violation of the work assignment regulations would fall within the grievance procedure of § 7121, the same argument relied on in this case; as demonstrated here, this view is at odds with the statutory scheme of the Act. But even assuming that the result in *Local 1497* is correct, it does not control this case. The assignment of work to employees in that case—unlike the decision to contract out in *this* case—arguably *does* have an impact on "work-

gress provided that, except for § 7106(b), *nothing* in Chapter 71 shall affect management's authority, "in accordance with applicable laws," to make determinations with respect to contracting-out. To reach its conclusion that the whole grievance procedure is somehow excluded from that sweep, the majority must read the phrase "applicable laws" to include *the remainder of Chapter 71*. Thus, it in effect reads the statute as follows: "Nothing in this chapter [71], *EXCEPT ALL THE OTHER PROVISIONS OF CHAPTER 71, INCLUDING § 7121 (PRESCRIBING GRIEVANCE PROCEDURES)*, shall affect the authority of any management official of any agency ... to make determinations with respect to contracting out ..." (italicized matter supplied). It is absurd to construe the act to say that "*nothing*" in the rest of Chapter 71 affects management's right, but that the rest of Chapter 71 *does* affect that right. This construction is at variance with any reasonable interpretation of the statute. The majority points to nothing in the legislative history which indicates that specifically denominated, non-negotiable rights conferred on "management officials" were nevertheless to be subjected to grievance and arbitral review.

It may be that the majority is not reading the statute that broadly, that not *all* of the remainder of Chapter 71 falls under "applicable laws." It may, perhaps, be suggesting simply that Congress' (unarticulated) intent in § 7106(a) was to shield the decision-making process from *negotiation*, but not from *subsequent review* by labor arbitrators and the FLRA. Again, there is no shred of legislative history which indicates that Congress intended contracting-out decisions to be grievable. But the intent of Congress can be inferred from what it wrote. It did *not* say that contracting-out decisions (and

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ing conditions," and hence might fall under the specific definition of "grievance" in § 7103(a)(9). *See* pages 12-13 *infra*.

the other management rights) are "non-negotiable." Had it done so, grievance review arguably would still remain. Instead, it said that, except for § 7106(b), *nothing in Chapter 71 can affect the right of the agency to make contracting-out decisions*. The latter phrase would be singularly inept if what Congress meant was the former, and at least in the absence of clear Congressional intent or a manifestly unsound result this court should refrain from directly violating the express language adopted by Congress.

C.

Next, even if we assume that (1) the term "applicable laws" *does* include all the rest of Chapter 71, and (2) the exercise of a non-negotiable management right *is* subject to the grievance provisions, it is far from clear that a failure to comply with Circular A-76 would meet the definition of a "grievance" for purposes of 5 U.S.C. § 7121.

The term "grievance" is defined *restrictively* by Congress in 5 U.S.C. § 7103(a)(9)(C)(ii), as here relevant, to *mean*[8] "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation *affecting conditions of employment*" (emphasis added).[9] The

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[8] A statute that defines a term with the phrase "to mean" is generally restrictive; "to include" is generally expansive. The majority's description of the term "conditions of employment" as "expansive," *see* Maj. at 3, is thus incorrect.

[9] The majority also notes that the definition of "grievance" also includes "any matter relating to the employment of any employee," 5 U.S.C. § 7103(a)(9)(B), and then asserts that a violation of substantive contracting-out criteria "surely falls within this definition." Maj. at n.18. But there is nothing "sure" about it. Again, the Authority has not made this claim and the majority offers no support. I note that under the majority's apparent reasoning, the *very decision to adopt a particular economic formula itself would be grievable*, because it might at some time in the future, if implemented, have some effect on employment. There is no indication

term "conditions of employment" is also restrictively defined to *mean* "personnel policies, practices, and matters ... affecting *working conditions*." 5 U.S.C. § 7103(a)(14) (emphasis added). Thus, even under the majority's interpretation of the statute, a violation of agency regulations is a "grievance" under § 7103(a)(9)(C)(ii) *only* to the extent that such violation involves personnel policies and practices or the *working conditions* of the employees. These are plainly words of limitation—*i.e.*, not *all* violations are grievable—and there is *no* indication that such limitation was inserted inadvertently.

The majority's footnote suggestion that Circular A-76 may have something to do with personnel policies or practices is insubstantial.[10] It must, then, be fitted (if anywhere) under the phrase "matters ... affecting working conditions." But a contracting-out decision, even when it results in a loss of jobs, is not necessarily a decision affecting the *working conditions* of the employees. While ordinarily the term "working conditions" is to be broadly interpreted, *see Independent Federation of Flight Attendants v. Trans World Airlines*,

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that Congress intended such decisions to be subject to arbitral review.

[10] The majority asserts that even if the Supreme Court's interpretation of "working conditions" *(see infra)* applies, failure to comply with the Circular's substantive economic guidelines for making contracting-out decisions would nevertheless "undoubtedly fall under the umbrella of personnel policies or practices." Not even the Authority in this case has suggested that substantive contracting-out criteria are transmuted into "personnel policies or practices" by virtue of the fact that they may at some point have some sort of impact on the continued employment of particular employees. Not surprisingly, the majority offers no support whatever for this extraordinarily broad reading. Had Congress intended the term "conditions of employment" to include "anything which has or may at some time in the future have an impact on the employment of an employee," it could easily have said so. It did not.

Inc., 1655 F.2d 155, 157 (8th Cir. 1981), it nevertheless "has a . . . specific meaning in the language of industrial relations," *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974), and clearly means "something less than the employment relationship in its entirety." *Southern Railway Co. v. OSHRC*, 539 F.2d 335, 339 (4th Cir.), *cert. denied*, 429 U.S. 999 (1976). In interpreting the same term in another statute, the Supreme Court explained that "the element of working conditions encompasses two subfactors: 'surroundings' and 'hazards.'" *Corning Glass, supra*, 417 U.S. at 202 (interpreting the Equal Pay Act). This court subsequently noted that *only* "surroundings" and "hazards" fall within the labor relations meaning of "working conditions," *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 452 n.153 (D.C. Cir. 1976), and in the FLRA we are dealing with a "labor relations" act. With reference to the term "working conditions" in yet another act, other circuits have held that the term refers to the "environmental area in which an employee customarily goes about his daily tasks." *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980); *Southern Railway, supra*, 539 F.2d at 339. There is no indication that the term "working conditions" in the statute at issue here (which was used by Congress several years after the *Corning Glass* decision, presumably with knowledge of the meaning assigned to those words by the Court) was intended to have a different, much broader meaning that it enjoys in other labor relations statutes passed by Congress.[11]

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[11] The majority relies on Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982), as sanctioning a "broad" construction of the phrase "conditions of employment" in the Act. That case, however, involved union proposals relating to (1) registration of employee automobiles, and (2) provision of certain consumer goods to employees in overseas post exchanges. Both provisions fall clearly within the scope of personnel practices and procedures, and nei-

It might be argued, on analogy to the National Labor Relations Act (NLRA), that contracting-out decisions *do* fall within the term "conditions of employment." In one NLRA case, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964), the Supreme Court interpreted the term—which is *not* defined in the NLRA—to include contracting-out. However, in the Federal Labor Relations Act, unlike the NLRA, Congress—which presumably was aware of both *Fibreboard Paper* and *Corning Glass*—chose to define the term *strictly* in a much narrower fashion: it means *only* personnel policies and practices and matters affecting "working conditions." The meaning attached to a term in one statute, where Congress has not defined it, is irrelevant to its meaning in another statute where Congress *has* defined it. It is the phrase *working conditions*, not *conditions of employment*, which acts to narrow the scope of grievances under the FLRA.[12]

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ther even remotely interferes with any reserved management right.

I am unpersuaded by the majority's flat assertion—it is nothing more—that Congress' definition of "working conditions" in one statute simply "does not apply" in another statute. Noting that Congress did not elaborate on its definition in the statute's legislative history, the majority just presumes that it must have meant something different in this statute than it meant when it used the identical phrase in other statutes. But the most plausible explanation for the lack of discussion in the legislative materials is that Congress assumed that its use of the words "working conditions"—words that it had used previously and which the Supreme Court recognized have a definite, specialized meaning in the labor relations field—made it unnecessary to waste additional pages of its committee reports illuminating the obvious.

[12] I must note that, contrary to the majority's assertion, I do *not* "maintain[ ] that grievances are restricted to claims involving surroundings and hazards." *See* Maj. at n.18. On the contrary, the statute at issue requires bargaining over (1) "personnel policies," and (2) personnel "practices," as well as (3) "matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14).

Since a violation of the regulation involved in this case would be grievable only to the extent it affected the environmental conditions under which employees work, it is difficult to see what sort of violation of Circular A-76 could have any effect on the *working conditions*—as opposed to the continued employment—of the bargaining unit employees. The Circular governs decisions regarding *when* agencies should contract out; it does not specify the internal agency personnel policies which would implement such decisions. It conceivably could result in the termination of an employee, but would have little or no effect on *conditions* in the workplace.

D.

The FLRA itself apparently recognizes that some claimed violations of the Circular will turn out to be non-grievable, but insists that *each claimed violation* must in the first instance go to an arbitrator.[13] Under that approach, the arbitrator would decide whether or not the violation is grievable, subject to FLRA review.[14] The FLRA has flatly refused to supply any guidance as to which parts (if any) of the Circular it thinks might be grievable. The EEOC sought such

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[13] That would, as pointed out *supra*, submit each work project contracted out to *mandatory* negotiation, in violation of the purely elective negotiation provided for in § 7106(b)(1).

[14] FLRA review of an arbitrator's decision is very similar to judicial review of ordinary arbitral awards. It may set aside an award only on two grounds: "(1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a). Thus, the majority's construction assures that *every* managerial decision with respect to "contracting out," if questioned, would ultimately be made, not by the agency, but by the arbitrator *practically free of any real review*.

guidance in its petition for reconsideration,[15] but the FLRA, finding that the request presented no "extraordinary circumstances," curtly denied it.[16] Hence, under the FLRA's construction, *every alleged violation of the Circular, the basic purpose of which is to provide SUBSTANTIVE guidance for management decisions regarding contracting out, must go to an arbitrator.*

The FLRA's cavalier, conclusory treatment of the EEOC's legitimate request can be seen as an implicit admission that disclosure of the parts it considers *might* be grievable would amount to such an extreme denial of elementary managerial authority as to make it perfectly obvious that its construction is a plain violation of the

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[15] The EEOC explained its request for clarification in its letter requesting reconsideration:

> For example, OMB Circular A-76 and other applicable laws and regulations concerning contracting out contain procedures for the guidance of management in the technical aspects of contracting out which do not directly affect conditions of employment. . . .
>
> [I]t seems clear to us that the Union proposal at issue, is not, *on its face*, limited to conditions of employment. . . . Since the EEOC has many contracts with no direct or indirect impact on conditions of employment of bargaining unit members, we are asking the FLRA to explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of the scope of bargaining and the grievance resolution machinery under the Statute.

[16] The Authority finds that such a request does not establish "extraordinary circumstances" warranting reconsideration as required under section 2429.17 of the Authority's Rules and Regulations. Rather, the Agency in essence is asking the Authority to make arbitrability determinations in the absence of a specific factual context. To the extent that an arbitrability question may arise in the future, the Agency may, of course, avail itself of the procedures set forth in section 7121 of the Statute for the resolution of such questions.

AFGE, Nat'l Council of EEOC Locals, 10 F.L.R.A. No. 1 (Mar. 18, 1983) (footnote omitted) (order denying reconsideration).

intent expressed by Congress. The same conclusion can be reached with respect to the construction adopted by the majority here. The majority's construction assures that *every* managerial decision with respect to "contracting-out," if questioned, will ultimately be made, not by the agency, but by an arbitrator, subject to very limited review. This results in a complete negation of the intent expressed by Congress.

This interpretation of the grievance procedure offers the union a fertile source of weapons for obstructing or delaying contracting-out decisions, a situation Congress specifically sought to prevent. It is not difficult to visualize what will happen. The union can file a grievance, claiming that one of the technical standards of the Circular (wholly unrelated to working conditions) was not complied with. The claim as to that particular project must go to an arbitrator, who on a case-by-case basis will evaluate it. Assuming that the arbitrator correctly follows the law, the grievance will be denied. The union then will file exceptions to the award with the FLRA, and months—or, drawing on the experience of the National Labor Relations Board, even *years* —later, the FLRA may deny the exceptions. Review in the court of appeals may follow.[17]

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[17] Review in the court of appeals is governed by 5 U.S.C. § 7123(a), which grants review to:

> [a]ny person aggrieved by any final order of the Authority *other than an order under—*
>
> (1) *section 7122 of this title (involving an award by an arbitrator)*, unless the order involves an unfair labor practice under section 7118 of this title....

(Emphasis added.) Thus, Congress specifically has removed FLRA actions approving or disapproving most arbitral awards from direct judicial review. (Judicial review may still be available if the FLRA seeks judicial enforcement under 5 U.S.C. § 7123(b).) Without doubting the good faith of the FLRA, I note that should it later attempt to thwart the will of Congress by whittling away specifically reserved management rights through the use of case-

Even if the grievance is eventually denied, and that denial is affirmed, the prolonged litigation will have cast a cloud over the agency's contracting-out decision, subjected the decision to considerable delay, and wasted valuable agency assets on an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions.[18] The majority's construction thus fails to comply with Congress' admonition that Chapter 71 "be interpreted in a manner consistent with the requirement of an effective and efficient government." 5 U.S.C. § 7101(b).

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by-case arbitration, there may be little the courts can do to correct it. The FLRA's policy of forcing all alleged violations—whether ultimately found grievable or not—to go to an arbitrator in the first instance may effectively shield future decisions plainly inconsistent with the will of Congress.

[18] The EEOC in its brief explains the possible consequences of this kind of substantive review:

> [A]n EEOC employee could challenge the agency's contracting-out decision by arguing that the underlying comparative cost analysis [one of the standards set forth in the Circular] was flawed. If the issue went to arbitration, an arbitrator could decide that the analysis was inadequate under the [Circular's] guidelines ... and therefore did not justify the Agency's conclusion that the commercial activity in question could be performed most inexpensively by a private source. The ultimate result could be a ruling sustaining the employee's claim, and requiring the EEOC to reconsider its contracting-out determinations after conducting another comparative cost analysis.

Reply Brief for Petitioner at 3-4. Under the majority's construction of the statute, avoidance of this scenario depends greatly on the good faith of the FLRA in subsequently holding such direct review of substantive decisions to be non-grievable. There is, however, nothing in the decision under review which rules out the possibility that the FLRA may wind up reviewing all such determinations in grievance proceedings.

IV. CONCLUSION

All of the above was recognized by the union; its apparent goal was to incorporate *substantive* contracting out criteria (over which neither it nor management may bargain), into the collective bargaining agreement, which would make them grievable and hence would subject them to arbitral review. The union's pursuit of this case is utterly inexplicable on any other basis.[19] Yet the FLRA and the majority hold that contracting out and the other reserved rights *already* are covered by the grievance mechanism, and that the processes and criteria used by an agency in making contracting-out determinations must be reviewed by arbitrators and the FLRA through that mechanism. For the reasons set forth above, it is my view that such holding is completely contrary to the language of the applicable statutes, drastically undercuts the specific statutory right of management to contract out, and effectively guts the specific reserved limitations that Congress placed on the agency's duty to bargain and the authority of the FLRA.

I accordingly dissent.

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[19] If, as the majority claims, it is entirely obvious from the statute that violations of the Circular are already grievable as a matter of law, why would the union waste its time, effort, and money in pursuing first the contract proposal and now this action? Even if the EEOC eventually agrees to the proposal—which would contradict the intent of Congress and which, even under the majority's construction, the agency obviously is not required to do—the union's remedies for violations of the Circular are, under the majority's construction, exactly the same. It seems absurd to talk of "bargaining" over a proposal which the majority believes will impose no cost on the agency and confer no benefit on the employees.

APPENDIX B

UNITES STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., INTERVENOR

[Filed Dec. 3, 1984]

Before: WRIGHT and TAMM, *Circuit Judges* and MACKINNON, *Senior Circuit Judge**

ORDER

On consideration of petitioner's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

For the Court
GEORGE A. FISHER, *Clerk*

By: /s/Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Senior Circuit Judge MacKinnon would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, ET AL.,
INTERVENOR

Filed Dec. 3, 1984

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, and STARR, *Circuit Judges**

ORDER

Petitioner's suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that petitioner's suggestion is denied.

Per Curiam

For the Court
GEORGE A. FISHER, *Clerk*

By: /s/Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Circuit Judges Bork, Scalia and Starr would grant the suggestion for rehearing *en banc*

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-314

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS
UNION

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of three Union proposals. Upon consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

> Section 1—The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

In agreement with the Union, the Authority finds this proposal is not inconsistent with management's right to "make determinations with respect to contracting out"under section 7106(a)(2)(B) of the Statute. The proposal would require management to exercise its

right to make contracting out determinations in accordance with whatever applicable laws and regulations exist at the time of such action. Hence, it would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management.

Thus, this proposal is distinguishable from proposal 1 which was held nonnegotiable in *National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA No. 105 (1981), *affirmed as to other matters sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, ___ F.2d ___ (D.C. Cir. 1982). That proposal, in contrast with the present disputed proposal, would have incorporated into the parties' agreement specific limitations on management's discretion reflecting particular provisions of OMB Circular No. A-76; hence, it would have required management to comply with those terms during the life of the contract regardless of whether the directive from which they were derived were to be revised or rescinded. In reaching that decision the Authority stated, at 4 of the decision, as follows:

> This [nonnegotiable] proposal is to be distinguished from one which requires the Agency to act in accordance with whatever applicable OMB directives/circulars may be extant at the time the Agency is exercising its right to contract out. Such a proposal would only require that when management acts, it does so in accordance with applicable OMB directives existing at the time.

Accordingly, it is concluded that the present proposal is not inconsistent with section 7106(a)(2)(B).

The Agency's further claim that the proposal would conflict with OMB Circular No. A-76, itself, because it would subject grievances concerning application of the

Circular to the negotiated grievance procedure, also cannot be sustained. The Agency states in this regard that grievances arising in connection with the application of the Circular only can be pursued through the procedures prescribed by the Circular, *i.e.*, that the provisions of the Circular limit the scope and coverage of grievance procedures negotiated pursuant to the Statute. This contention is without merit. A materially identical argument with respect to directives of the Office of Personnel Management was considered and rejected in *American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 FLRA No. 56 (1981). There, the Authority concluded, at 9 of the decision, that "OPM regulations . . . may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under section 7121 of the Statute." [Footnote omitted.] Rather, the Authority held that the Statute and its relevant legislative history required that grievance procedures negotiated under section 7121 cover all matters that under the provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining. Consequently, even assuming in the present case that a conflict between the proposal and the Circular exists, as claimed by the agency, and that the Circular is a Government-wide rule or regulation within the meaning of the Statute, it must be concluded herein, for the reasons stated in *Bureau of the Census*, that the Circular in question does not limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure.

It must be emphasized in this regard that the Agency has misinterpreted the legal effect of the disputed proposal: the proposal would not itself change the scope and coverage of the parties' grievance procedure. That is, under the Statute, even in the absence of the con-

tract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless the particular grievance is inconsistent with law (*see American Federation of Government Employees, AFL-CIO, Local 3403 and National Science Foundation, Washington, D.C.*, 6 FLRA No. 114 (1981) (proposal 3)) or unless the parties exclude such grievances through negotiations (*see, e.g., American Federation of Government Employees, AFL-CIO, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 FLRA 320 (1980)).

In view of the above, the Authority concludes that Union Proposal 1 is within the duty to bargain.

Union Proposal 2

> Section II—The EMPLOYER shall notify the council and appropriate Local President(s) of its intention to solicit bids for contract work which could result in a reduction-in-force or transfer or abolition of function affecting employees in the unit. Such advance notice shall provide a full explanation of the reasons for such actions and provide the UNION sufficient opportunity to respond in writing.

This proposal would provide the Union with advance notice and an opportunity to respond to the Agency's reasons for its "intention" to contract out work when such action could adversely impact unit employees. Giving the language of the proposal its common meaning in the absence of any contrary indication in the record, the Authority finds that the proposal would apply when management has decided to solicit bids for contract work which in its judgment could lead to, *e.g.*, a reduction in force, but has not yet implemented its decision. It is concluded, as claimed by the Union, that under

these circumstances the proposal is not too remote and speculative, and instead would directly affect the conditions of employment of unit employees under the Statute so as to be within the duty to bargain to the extent not inconsistent with applicable law or regulation.

As to law, the Agency's claim that the proposal would violate its statutory right to make determinations with respect to contracting out cannot be sustained. The Authority finds, rather, that the proposal is essentially procedural and would only require advance notice to the Union and an opportunity to reply, as already stated. Thus, the proposal is within the ambit of section 7106(b)(2) of the Statute which provides that "procedures which management officials will observe in exercising" their reserved rights are negotiable. In this regard, the proposal clearly would not prevent the Agency from acting at all to make and implement its determination with respect to contracting out and thus is a negotiable procedure under section 7106(b)(2). *See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA 152 (1979), *enforced sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, ___ U.S. ___, 102 S.Ct. 1443 (1982). *Cf. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA No. 105 (1981), *affirmed sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, ___ F.2d ___ (D.C. Cir. 1982) (wherein proposal 1, requiring the agency to make available to the union certain "milestone charts" used by management in deciding whether to contract out, was held nonnegotiable be-

cause it involved the union directly into the internal deliberative process).

Finally, as to regulation, the Agency relies on 41 CFR §§ 1-1.011-2 and 1-2.202-1. Assuming without deciding that these regulations are Government-wide within the meaning of section 7117(a) of the Statute so that they could bar negotiation of a conflicting proposal, the Agency has not established that Union Proposal 2 is inconsistent with such regulations. Specifically, section 1-1.011-2 declares that Congress' policy is to promote economy, efficiency and effectiveness in the procurement of property and services by taking or avoiding certain actions. There is no implication, however, that lawful collective bargaining is to be avoided. Further, section 1-2.202-1 provides that it is Government policy, consistent with its needs, to allow sufficient time between the distribution of an invitation for bids and the date for opening bids to permit prospective bidders to prepare and submit bids. Thus, this regulation is concerned with what happens *after* a solicitation of bids whereas the proposal is concerned with the period *prior* to such solicitation. Thus, there is no facial inconsistency between the disputed proposal and this regulation and the Agency has not established in the record that there is a conflict.

In summary, Union Proposal 2 concerns conditions of employment under the Statute and the Agency has not established that it is inconsistent with section 7106(a)(2)(B) of the Statute or with the rules or regulations cited by the Agency. Hence, it is within the duty to bargain.

Union Proposal 3

> Section III—The parties shall negotiate the [e]ffect of any contracting-out decision which could alter the conditions of employment in the bargaining unit prior to implementing the decision to contract-out. The EMPLOYER agrees

> to eliminate or minimize any potential adverse [e]ffect through reassignment or training and to take whatever other action may be necessary to protect bargaining unit employees.

The Union's statement before the Authority indicates that its proposal would require the Agency to minimize the effect of contracting out as to "all persons being affected." Thus, under the language of the disputed proposal, confirmed by the Union's statement as to its intended meaning, the proposal would go beyond requiring the Agency generally to minimize the effect of contracting out on the bargaining unit with due regard for applicable laws including the Statute, as did the proposals held negotiable by the Authority in *International Association of Machinists and Aerospace Workers, Local 2424 and Department of the Army, Aberdeen Proving Ground, Maryland*, 8 FLRA No. 117 (1982). Rather, the instant proposal would specifically require the Agency to reassign or train "all persons" who would be adversely affected by contracting out and to take "whatever other action may be necessary" to protect each one of them.

Accordingly, in agreement with the Agency, the Authority concludes that this proposal in effect would preserve absolute employment security for such employees. As a consequence it would not constitute an "appropriate" arrangement for employees adversely affected by management's exercise of its statutory rights.[1] *Cf. National Federation of Federal Employ-*

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[1] Section 7106(b)(3) of the Statute provides:

> § 7106. *Management rights*
>
> . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> . . . .

ees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA No. 105 (1981), *affirmed as to other matters sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, ___ F.2d ___ (D.C. Cir. 1982) (wherein proposal 4, requiring the agency only to *consider* restricting new hires in order to retain bargaining unit employees in contracting out situations, constituted an "appropriate arrangement" under section 7106(b)(3)). Rather, this proposal would directly interfere with the Agency's exercise of, *inter alia*, its right under section 7106(a)(2)(A) of the Statute to "layoff" employees and, thus, is outside the duty to bargain.[2] *National Treasury Employees Union and Internal Revenue Service*, 7 FLRA No. 42 (1981) (proposal 5).

Therefore, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1 and 2.[3] IT IS FURTHER ORDERED that the portion

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(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[2] In view of this decision, the Authority finds its unnecessary to rule as to other statutory rights claimed by the Agency to be violated by the proposal.

[3] In finding these proposals to be negotiable, the Authority makes no judgment as to their merits.

of the Union's petition for review concerning Union Proposal 3 be, and it hereby is, dismissed.

Issued, Washington, D.C. September 2, 1982

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, *Chairman*

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, *Member*

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, *Member*

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, ET AL.,
INTERVENOR

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

[Filed Sept. 21, 1984]

Before: WRIGHT AND TAMM, *Circuit Judges*, and MACKINNON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard in a petition for review and cross-application for enforcement of an order of the Federal Labor Relations Authority, and was argued by counsel. On consideration thereof it is

ORDERED, and ADJUDGED, by this Court, that the Authority's order is enforced, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

GEORGE A. FISHER, *Clerk*

Date: September 21, 1984
Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Senior Circuit Judge MacKinnon.

Office-Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1728

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY
and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNION RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 1985

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QUESTION PRESENTED

Whether, for the limited purpose of assuring compliance with applicable law and regulation, a dispute over a federal agency's determination to contract out work performed by its employees may be submitted to arbitration pursuant to 5 U.S.C. § 7121.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY
and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (FLRA) (Pet. App. 40a-48a) is reported at 10 FLRA 3. The FLRA's order denying petitioner's motion for reconsideration is reported at 11 FLRA 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on September 24, 1984. A timely petition for rehearing was denied on December 3, 1984 (Pet.

App. 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to the statutory provisions set forth in the petition, at 2-3, the case requires consideration of the following.

5 U.S.C. § 7103(a)(14) provides:

> "[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute[.]

5 U.S.C. § 7121 provides:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance in the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

* * * * *

5 U.S.C. § 7122(a) provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—
>
> (1) because it is contrary to any law, rule, or regulation; or
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

STATEMENT

Respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (AFGE or union) is a labor organization representing employees of petitioner Equal Employment Opportunity Commission (EEOC or employer).

During negotiations, the EEOC refused to bargain over the union's proposals relating to the employer's responsibilities in making determinations to contract out to private enterprise work performed by bargaining unit employees (Pet. App. 40a-47a). Specifically, the employer refused to bargain over the following proposals:

Union Proposal I

> Section I—The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

Union Proposal II

> Section II—The EMPLOYER shall notify the council and appropriate Local President(s) of its inten-

tion to solicit bids for contract work which could result in a reduction-in-force or transfer or abolition of function affecting employees in the unit. Such advance notice shall provide a full explanation of the reasons for such actions and provide the UNION sufficient opportunity to respond in writing.

Union Proposal III

Section III—The parties shall negotiate the [e]ffect of any contracting-out decision which could alter the conditions of employment in the bargaining unit prior to implementing the decision to contract-out. The EMPLOYER agrees to eliminate or minimize any potential adverse [e]ffect through reassignment or training and to take whatever other action may be necessary to protect bargaining unit employees.

(Pet. App. 40a, 43a, 45a, 46a).

AFGE, pursuant to 5 U.S.C. § 7117,[1] appealed the employer's refusal to bargain over these proposals to the Federal Labor Relations Authority (FLRA). The FLRA declared the first two proposals negotiable, ordering the employer to bargain with the union over them; the FLRA declared the third proposal nonnegotiable as outside the statutory duty to bargain.[2]

With regard to the first proposal, which is the focus of the employer's petition, the FLRA found that it was not inconsistent with management's right to "make determinations with respect to contracting out" under section 7106(a)(2)(B) (Pet. App. 40a). The FLRA held that

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[1] Labor-management relations in the federal service is governed by Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII (the labor relations title) appears at 5 U.S.C. § 7101 *et seq.*

[2] The FLRA reasoned that this proposal created absolute employment security for employees affected by a decision to contract out unit work, thereby directly interfering with the employer's right under section 7106(a)(2)(A) to layoff employees (Pet. App. 46a-47a).

a contractual agreement whereby the employer agreed to comply with OMB Circular No. A-76 and other applicable laws and regulations relating to contracting out would not impose any substantive limitations upon management's right to make contracting out determinations apart from those already existing (Pet. App. 41a).

The FLRA also rejected the employer's contention that its right to make contracting out determinations would be unlawfully impeded in that the proposal would subject its contracting out actions to resolution by the parties' grievance procedure (Pet. App. 42a). In this regard, the FLRA recognized that questions concerning the employer's contracting out actions, even in the absence of the contract provision proposed by the union, were grievable unless the parties, through negotiations, agreed to exclude such grievances, or a particular grievance was inconsistent with law (Pet. App. 42a-43a).

The FLRA also rejected the employer's argument that a union's complaints over a contracting out decision would be solely reviewable under the procedure established by OMB Circular No. A-76 (Pet. App. 41a-42a), whereby an employer reviews its own actions.

The FLRA held that even if there was a conflict between the proposal and the Circular, the latter does not limit the statutorily prescribed scope and coverage of the grievance procedure (Pet. App. 42a).[3]

With regard to the second proposal, requiring the employer to provide the union with advance notice and opportunity to respond to the employer's reasons for considering contracting out work performed by unit em-

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[3] In reaching its conclusion, the FLRA relied upon its earlier decision in *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 FLRA 314 (1981), where at issue was a regulation of the Office of Personnel Management which purported to exclude from the grievance procedure some employee complaints. 6 FLRA at 321.

ployees, the FLRA rejected the employer's argument that the proposal would impermissibly interfere with its right to make contracting out determinations (Pet. App. 44a). In so doing, it also found that there was no inconsistency between the proposal and federal procurement regulations calling for "economy, efficiency and effectiveness in the procurement of property and services" (Pet. App. 45a).

The EEOC sought reconsideration of the FLRA's decision (*see* Pet. App. 6a, n.9), requesting, in part, that the FLRA "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute." 11 FLRA 720.

The FLRA denied the request, finding that the employer was asking the FLRA, in effect, to make arbitrability determinations in the absence of a specific factual context. *Id.*, 721. The FLRA continued by advising the employer that it could avail itself of the statutory procedure under section 7121 for resolving arbitrability questions.[4]

The employer sought review under section 7123(a) of the FLRA's decision insofar as it required negotiations over the proposal whereby the employer would agree to conform its contracting out actions to OMB Circular No. A-76 and other applicable law and regulation (Pet. App. 1a, 6a). The FLRA filed a cross-petition for enforcement (Pet. App. 6a).

A panel of the court of appeals, one member dissenting, enforced the FLRA's order (Pet. App. 1a-37a), holding that the proposal would not unduly interfere with the

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[4] Under the scheme crafted by Congress, questions of arbitrability are to be resolved, in the first instance, by arbitrators. 5 U.S.C. § 7121(a)(1). The arbitrator's ruling on the arbitrability question is reviewable by the FLRA upon exceptions filed by a party. 5 U.S.C. § 7122(a). *See* Celmer, *Substantive Arbitrability*, 81 Federal Labor Relations Reporter No. 17 (Oct. 1981).

employer's prerogative to make contracting out determinations. In reaching this conclusion, the court of appeals agreed with the FLRA's finding, in effect, that the language of the proposal merely echoed the statutory requirement that contracting out determinations, like other reserved management prerogatives affecting conditions of employment, are grievable to the extent questions exist as to their conformance with law or regulation (Pet. App. 9a). In this regard, the court observed that the proposal imposed no substantive criteria upon management's reserved authority to make contracting out determinations (Pet. App. 9a). The court continued by observing that both section 7106(a)(2)(B), which preserves management's authority to make contracting out determinations, and section 7103(a)(9) which, along with section 7121, defines the scope and coverage of grievance procedures in the federal sector, evidence that even so-called management rights are "qualified" to the extent that an employer's actions must conform to law (Pet. App. 11a-15a).

The court also held, in agreement with the FLRA, that there was no inconsistency between the proposal and the provision in Circular A-76 providing for internal agency review of complaints over a contracting out determination (Pet. App. 16a). The court reasoned that the Circular did not operate to "create" a right of appeal, an object contrary to the Circular's own terms; the right to arbitral review was created by Congress in enacting the statutory grievance procedure (Pet. App. 16a). Furthermore, the court added, that even if there was an apparent inconsistency, Congress did not intend to allow agencies, by regulation, to restrict coverage of the grievance procedure (Pet. App. 16a).

The dissenting panel member would have denied enforcement of the FLRA's order, stating that the union's proposal would interfere with the employer' prerogative to make contracting out determinations by imposing substantive criteria upon management's decisionmaking au-

thority (Pet. App. 24a). In support of this conclusion, the dissent read the second clause of section 7106(a) ("nothing in this chapter shall affect the authority of any management official. . .") as limiting the coverage of the statutory grievance procedure (Pet. App. 28a-29a). The dissent also found that even if a contracting out decision results in the loss of jobs, it does not affect "conditions of employment" within the meaning of section 7103(a)(14), which the dissent views as much less inclusive than its analog in the private sector (Pet. App. 29a-33a).

REASONS FOR DENYING THE PETITION

Through its petition, the EEOC seeks review of the unremarkable finding by the court of appeals that contracting out decisions by that agency, as an employer, are subject to arbitral review for the limited purpose of assuring that they comply with law and regulation and then only to the extent that the parties by mutual agreement, or by order of the Federal Service Impasses Panel (FSIP),[5] have agreed to extend coverage to such disputes and the disputes are otherwise arbitrable.

Despite the employer's rhetoric to the contrary (Pet. 9), the decision by the court of appeals does not open the door for "vexatious litigation" by unions, undermine the

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[5] If the parties are unable to reach agreement over a bargaining proposal, statutory procedures are prescribed for resolving the impasse. 5 U.S.C. § 7119. As an initial step, the parties may seek to utilize the services of the Federal Mediation and Conciliation Service. 5 U.S.C. § 7119(a). If agreement still cannot be reached, either party may invoke the processes of the FSIP. 5 U.S.C. § 7119(b). Its members are appointed by the President; they are familiar with government operations and knowledgeable in labor-management relations. 5 U.S.C. § 7119(a)(2). The FSIP, either upon request by the parties, or by its own order, may require the resolution of an impasse through binding arbitration; alternatively, it may order the parties to submit the impasse to factfinding with recommendations or require the use of other dispute resolution mechanisms. 5 U.S.C. §§ 7119(b)(2) and 7119(c)(5).

government's efforts to achieve cost savings through contracting out, or allow for decisionmaking by arbitrators in place of government officials. Instead, as found by the court of appeals, the FLRA's decision upholds the legality of the union's proposal to secure the employer's contractual agreement to comply with law and regulation applicable to contracting out. The FLRA's decision, consistent with the intent of Congress, merely establishes arbitration as an initial forum for determining whether the employer's actions, to the extent they are constrained by OMB Circular No. A-76, or other applicable law or regulation, conform with these legal requirements. Simply put, the decision imposes upon government managers nothing more than what is already required of them, *i.e.*, to comply, in effect, with their own rules and regulations pertaining to contracting out.

The problems which the employer envisions not only are without factual support in this case but are by no means reasonably forseeable. However, even if there was some substance to the employer's contentions, the EEOC, like other federal employers, will have ample opportunity to renew its objections to the conclusion reached by the FLRA and the court of appeals. This opportunity will arise directly in connection with an employer's exceptions to an arbitral award, reviewable by the FLRA under 5 U.S.C. § 7122(a). The opportunity for further judicial review will arise in connection with a negotiability determination by the FLRA raising contracting out issues.[6]

1. a. Contrary to the employer's suggestion (Pet. 13a-15a), neither the court of appeals, nor the FLRA, has held that an arbitrator may substitute his or her judgment for some element of the contracting out process that

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[6] The EEOC has all but conceded as much, noting that another case raising questions over the negotiability of a proposal relating to contracting out is pending with the Ninth Circuit. *Defense Logistics Institute v. FLRA*, Nos. 84-7498 and 84-7610 (argued Mar. 11, 1985) (Pet. Br. 23, n. 20).

is reserved for management determination. Rather, each held that section 7106(a)(2)(B), which preserves managerial authority to make contracting out determinations, does not foreclose arbitral review of the employer's actions to assure that they conform with applicable law. While clearly articulating that an arbitrator was not barred by operation of statute from resolving disputes relating to the contracting out process, neither the court of appeals, nor the FLRA, suggested that contracting out disputes are to be decided as a matter of course in the federal sector without first ascertaining, in a particular context, the intention of the parties whether to include such disputes under their grievance procedure or to otherwise determine the arbitrability of a particular dispute. It is only in the absence of a specific factual situation in this case, that the employer can raise the spectre of an arbitrator deciding questions of national defense or other matters within the government manager's discretion. In the unlikely event that an arbitrator would intrude upon the employer's authority in such areas, the arbitral decision is subject to review by the FLRA and perhaps by the courts of appeals, fully insuring that the government's legitimate interests will be protected.

b. The employer's argument that arbitral review would affect an agency's "freedom to act" (Pet. 14) is both puzzling and troubling. The employer certainly is not asking this court, by granting its petition, to rule either that agencies may violate law, rule, or regulation so long as those requirements are not included in a collective bargaining agreement, or that noncompliance unfettered by challenge may further the efficiency of government operations. Yet, that is precisely what its argument implies.

As previously stated, the union's proposal creates a contractual duty to do nothing more than act in accordance with existing law, rule, and regulation. OMB Circular No. A-76 contains specific procedures and rules which all executive agencies are mandated to follow.

Stating that the union proposal would allow an arbitrator's judgment to be substituted for the agency's (Pet. 14-15) is far too simplistic. It is doubtful that an arbitrator would uphold a challenge that a decision involving discretionary aspects of Circular A-76 was an actual violation of law, thereby not in accordance with the parties' contract. However, the allegation of a miscalculation of a required cost factor, as established by the Circular, likely would involve a specific and recognizable standard by which to objectively measure an agency's actions. It would seem beyond attack that an executive agency should be bound by the dictates of the Executive's own contracting out requirements.

2. Despite the EEOC's suggestion to the contrary, there is no question but that an arbitral decision raising any of the concerns discussed in the petition would be subject to review by the FLRA. The FLRA is charged with the responsibility under 5 U.S.C. § 7122 to review exceptions to arbitral awards to assure that an award is not deficient as "contrary to any law, rule, or regulation; or . . . on other grounds similar to those applied by Federal courts in private sector labor-management relations." *See* 5 C.F.R. § 2425.1 *et seq.*

The problems which the employer envisions in allowing arbitrators to resolve contracting out disputes, if they arise, therefore, would be cognizable by the FLRA.[7] The FLRA would be able to review, for example, a contention by an employer, that an arbitrator's decision interfered with a management right by substituting arbitral judgment for a matter left solely to management discretion; that an award conflicts with a provision in OMB Circular No. A-76 or other applicable law or regulation; or that the parties' agreement did not encompass any con-

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[7] For a survey of the grounds upon which review from arbitral awards may be sought in the federal sector, *see* Frazier, *FLRA Policy and Practice on Arbitration Awards: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981).

tracting out disputes or excepted a particular dispute from its coverage. Moreover, the FLRA would be able to decide the questions in a specific factual context, after labor and management have been given a full opportunity to develop evidence and argument, with the benefit of an arbitral decision on the issues.

Furthermore, the FLRA's regulations allow for a party taking exception to an arbitral award to obtain a stay of the award pending FLRA decision on its exceptions, where a party can demonstrate both a likelihood of success on the merits and that a balance of the equities weighs in its favor. 5 C.F.R. § 2429.8.

Indeed, employers generally have been successful in obtaining from the FLRA stays of arbitral awards [8] and stays have been granted in the cases now before the FLRA involving contracting out disputes, as identified by the EEOC at 22, n.19 of its petition. Accordingly, there is no merit to the employer's contention (Pet. 10) that arbitral review will bar agencies from going ahead with plans to contract out work. Moreover, if an employer elects to proceed with a decision to contract out work, despite a challange to its legality or a finding by an arbitrator to that effect, it is hardly unjust that the employer, as a result, may have to rehire employees who were adversely affected by the employer's unlawful actions and make them whole for lost wages and other benefits.

3. The employer's claims that arbitral review will impede the government's efforts to achieve cost savings by contracting work to private enterprise where cost-effective to do so are also unconvincing.[9] Arbitral review can en-

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[8] *See* Celmer, *Procedure for Filing Exceptions to Arbitration Awards*, 82 Federal Labor Relations Reporter No. 18 (Oct. 1982).

[9] The focus of the case has been on the employer's adherence to the provisions of OMB Circular No. A-76. However, many employers have established their own regulations governing the contracting

sure that employers correctly cost out the relative expenses of performing work "in-house" and by contract. Where an employer, by ignoring requirements imposed by law, incorrectly determines that private enterprise can perform the function in a more cost-effective manner than by government personnel, arbitral review vindicates not only the rights of affected employees but also the public's interest in having work performed in a manner which achieves the greatest savings.[10] Thus, arbitral review will serve not only to save the public monies in particular cases where an employer has violated law or regulation but will serve as a prophylactic means to ensure that government managers do not abuse the public trust in obtaining services for the government.

In this connection, it bears repeating that the FLRA's decision imposes no new requirements upon employers. Under the decision, as before, employers are required to comply with the standards imposed by OMB Circular No. A-76 and other applicable law and regulation, including the employer's own regulations, relating to the contracting out process.

4. There is no merit to the employer's claim that the court of appeals and the FLRA incorrectly interpreted the labor relations title in finding that the EEOC must bargain over the union's proposal that it agree to comply with Circular A-76 and other applicable laws and regulations concerning contracting out (Pet. 15-21).

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out process, and agencies are bound by governmentwide regulations governing the procurement of goods and services as well as general and particular statutory provisions restricting agency discretion in this area.

[10] The union must admit to astonishment over the employer's unsubstantiated claim (Pet. 9-10) that arbitral review will result in millions of dollars cost to the government's contracting out process and its suggestion that it may "halt[] it entirely." There is certainly nothing in the record of this case that would lend any support to these contentions.

As the court of appeals recognized, section 7106(a)(2)(B), which preserves managerial authority to make contracting out determinations, itself qualifies that prerogative by requiring its exercise "in accordance with applicable law" (Pet. App. 8a). The court, thus, found that the union's proposal, if agreed to by the employer or imposed by the FSIP, would merely echo, as found by the FLRA, the statutory requirement under 5 U.S.C. §§ 7121 and 7103(a)(9), that, absent a contrary agreement by the parties, the statutory grievance procedure would encompass a complaint that an employer had contravened a provision within Circular A-76 or other law or regulation relating to contracting out (Pet. App. 9a, 15a). The result reached by the court and the FLRA is a natural construction of the statutory provisions; it stands in marked contrast to the EEOC's strained construction which would dismiss, as meaningless, the limiting language "in accordance with law" from section 7106(a)(2) and impose upon the definition of "conditions of employment" under section 7103(a)(14), a stilted and unnatural reading, totally at odds with any judicial construction of that term. *See e.g., Library of Congress v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983).[11]

Furthermore, the EEOC can point to no indication elsewhere in the labor relations title or its legislative history suggesting that Congress intended that an employer's contracting out determinations would fall outside the statutory grievance procedure. At the time the statutory scheme was crafted, it was well recognized that contracting out was a routine subject of negotiations between labor and management, which often was the subject of

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[11] Contrary to the employer's suggestion (Pet. 13), the FLRA's decision does not permit arbitrators to substitute their judgment for management in making contracting out determinations. As recognized by the court of appeals and the FLRA, an arbitrator will only be applying existing law or regulation, not substituting his or her judgment for matters left to the managers' discretion (Pet. App. 9a, 41a).

arbitration. *See* Fairweather, *Practice and Procedure in Labor Arbitration* 469-93 (2d Ed. 1983); Elkouri and Elkouri; *How Arbitration Works* 501-11 (3d Ed. 1973); *see also Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203, 211-13 (1964).

Congress, in seeking to preserve management authority in the contracting out area, chose to do so in the same manner as it did to protect managerial rights, among others, to hire, assign, layoff, retain, discipline employees, and to assign work. 5 U.S.C. § 7106(a). Congress not only qualified each "right" by restricting its exercise "in accordance with applicable laws," but it subordinated each right to the negotiation of procedures and appropriate arrangements for affected employees. 5 U.S.C. § 7106 (b). As the court of appeals aptly noted (Pet. App. 12a), if Congress had sought to exclude from the statutory grievance procedure disputes over the contracting out process, it would have utilized section 7121(c), wherein Congress foreclosed use of the grievance mechanism for disputes relating to prohibited political activities, retirement and insurance questions, suitability determinations, examination and appointment questions, and certain classification actions. Except for these subject areas, Congress envisioned arbitral review over all categories of disputes arising in the federal workplace.

The employer's case hinges upon the meaning to be attributed to section 7106(a)(1). Yet, in that same provision, Congress preserves managerial authority, among others, to direct, assign, layoff, and discipline employees. If managerial authority to make contracting out determinations under section 7106(a) operates to deny arbitral review of such determinations, then—contrary to uniform practice and existing precedent—it would logically follow that employees and their unions would be unable to grieve disciplinary actions, promotions, or reduction-in-force actions. Management, without employee recourse to the grievance mechanism, would be able to

avoid applicable law and regulation with impunity. In so doing, however, not only would the EEOC's position render the grievance mechanism a rather empty vessel, but it would also override clear legislative history, as recognized by the court of appeals (Pet. App. 14a, n. 20), that section 7106(a) does not operate to deny arbitral review of disciplinary actions.[12] Against this background, the inherent weakness of the EEOC's case becomes clear. Despite the employer's forewarning of doom, its position reduces to the proposition that Congress, in enacting section 7106(a)(2)(B), intended to deny arbitrators the authority to measure an employer's performance against standards imposed by law and regulation upon the very actions over which a grievance is filed.

Similarly, there is no merit to the contention that OMB Circular No. A-76 operates to deny arbitral review over disputes relating to the contracting out process. As the FLRA and the court of appeals held, even if there was some inconsistency with a regulatory provision which purported to establish an internal agency procedure as the sole means for challenging a contracting out decision by an agency, that provision could not override the statutory requirement that a grievance procedure, absent contrary bilateral agreement, allow for complaints over "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." *See* 5 U.S.C. § 7103(a)(9).[13]

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[12] 124 Cong. Rec. 29,183 (1978).

[13] The EEOC's reliance upon decisions relating to the grievability of issues involving national guard technicians (Pet. 21, n. 18) is misplaced. In the cases cited, it was a statutory conflict, not an alleged inconsistency between the statutory grievance procedure and applicable regulation, which was controlling. While there, the courts viewed the National Guard Technicians Act, 32 U.S.C. § 709, as more indicative of Congressional intent with regard to appeals by technicians than the statutory right to grieve under the labor relations title, the cases provide no support for the contention that a regulation can operate to restrict the right to grieve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-1728

In the Supreme Court of the United States

OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether a collective bargaining proposal that does not establish any substantive limitations on a federal agency's right, in accordance with applicable laws, to make determinations with respect to contracting-out, but instead only restates an agency's existing obligation to comply with requirements in Office of Management and Budget Circular A-76 and other applicable laws and regulations concerning contracting-out, is within the duty to bargain under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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In the Supreme Court of the United States
OCTOBER TERM, 1984

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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v.

FEDERAL LABOR RELATIONS AUTHORITY
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (Pet. App. 40a-48a) is reported at 10 F.L.R.A. 3; the Authority's denial of the Equal Employment Opportunity Commission's request for reconsideration of that decision is reported at 11 F.L.R.A. 720.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1984 and a petition for rehearing was denied on December 3, 1984. On February 26, 1985, the Chief

Justice extended the time within which to file a petition for a writ of certiorari to May 2, 1985 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 7103(a)(9) provides:

"[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides:

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the

personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121(a)-(c) provides:

Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided

in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

STATEMENT

1. The Federal Service Labor-Management Relations Statute (the Statute), as amended, 5 U.S.C. 7101-7135 (1982) and Pub. L. No. 98-224, §§3-4, 98 Stat. 47, 47-48 (1984), governs labor-management relations in the federal service. To administer the Statute, Congress created the Federal Labor Relations Authority ("FLRA" or "the Authority"). 5 U.S.C. 7104-7105. The Authority's responsibilities include resolving issues relating to the duty to bargain. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 3.

The Statute establishes a system of collective bargaining that requires federal agencies and employee unions to bargain in good faith "with respect to * * * conditions of employment." 5 U.S.C. 7103(a)(12). The term "conditions of employment" is defined in the Statute as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). The Statute excludes certain management prerogatives from the scope of negotiations. See 5 U.S.C. 7106. As pertinent to this case, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and a union from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106.

At the request of either party, the product of collective bargaining negotiations must be reduced to a collective bargaining agreement. 5 U.S.C. 7114(b). By the terms of the Statute, such a collective bargaining agreement must "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1).

Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance'";[1] Section 7121 lists only five subject matters that are statutorily excluded from the permissible scope of the negotiated grievance procedure.[2]

2. During the course of contract negotiations with the Equal Employment Opportunity Commission, the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (the union) proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.[3]

(Pet. App. 40a). EEOC declared the proposal nonnegotiable and refused to bargain over it *(ibid.)*. To resolve the dispute, the union filed a petition for review with the Authority pursuant to 5 U.S.C. 7117(c) *(ibid.)*.

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[1] H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 686 (Comm. Print No. 96-7) *(Legis. Hist.)*.

[2] The five subject matters excluded are:

> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
>
> (2) retirement, life insurance, or health insurance;
>
> (3) a suspension or removal under section 7532 of this title;
>
> (4) any examination, certification, or appointment; or
>
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. 7121(c). Parties can, in negotiation, agree to exclude more. 5 U.S.C. 7121(a)(2).

[3] OMB Circular A-76 applies to Executive agencies and provides direction for agency decisions whether to contract out to private enterprise for products and services the government needs. 44 Fed. Reg. 20556 (1979).

Upon consideration of the entire record, the Authority issued a decision finding the proposal negotiable (Pet. App. 40a-48a).[4] The Authority concluded that the proposal did not impair EEOC's statutory right to make contracting-out determinations because it only recognized existing external limitations on EEOC's right and did not establish any substantive limitations on management discretion (Pet. App. 41a).

The Authority further concluded that the proposal was not rendered nonnegotiable by the terms of the Circular. The Authority rejected the assumption underlying this argument that contracting-out disputes are not grievable in the absence of the proposed contract language (Pet. App. 42a). The Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining *(ibid.)*. Accordingly, the Authority stated that even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (Pet. App. 42a; emphasis in decision).

3 In an opinion by Judge Tamm, the court of appeals (Senior Judge MacKinnon, dissenting) upheld the Authority's decision and enforced the Authority's order (Pet. App. 1a-37a). The court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 8-9, stated at the outset that "the Authority is entitled to 'considerable deference' when interpreting and applying the [Statute's] provisions to specific situations" (Pet. App. 7a). See also Pet. App. 7a n.11.

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[4] When the Authority finds a proposal negotiable, the Authority holds only that the agency must bargain over the proposal in good faith and upon the union's request. The Authority neither considers the merits of the proposal nor orders the agency to agree to it. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations and that any bargaining proposal regarding contracting-out would restrict that authority. The court found that the Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" (Pet. App. 8a). Since the union's proposal essentially echoed the statutory requirement that contracting-out determinations be made in accordance with applicable laws, the court agreed with the Authority's conclusion that the proposal, which did not of itself establish any substantive criteria guiding management's contracting-out determinations, did not affect the scope of that authority reserved to management by the Statute (Pet. App. 9a).

Second, the court rejected EEOC's argument that the adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure. The court noted that this EEOC argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal. Such an assumption, the court found, was "contrary to the text" of the Statute which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" and which, in 5 U.S.C. 7121(c), expressly excludes the subject matter of only five types of grievances from the coverage of the negotiated grievance procedure (Pet. App. 12a).[5]

[5] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of matters grievable (Pet. App. 14a-15a). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement." 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924.

Finally, the court rejected EEOC's argument that the language of the Circular renders the proposal nonnegotiable (Pet. App. 16a). First, the court noted that the proposal is not inconsistent with the Circular in that the Circular only states that its provisions "shall not be construed to create" any new right of appeal, whereas the court had just found that the right to file grievances regarding contracting-out decisions is created by the Statute. Second and, "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (Pet. App. 16a). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place limitations in the Statute not placed there by Congress *(ibid.)*.

Senior Judge MacKinnon dissented (Pet. App. 18a-37a). He concluded (Pet. App. 19a) that violations of the Circular and other regulations regarding substantive contracting-out decisions are not statutorily grievable under a negotiated grievance procedure.

The court of appeals denied EEOC's petition for rehearing; the court of appeals also denied EEOC's suggestion for rehearing en banc (Pet. App. 38a-39a).[6]

ARGUMENT

The decision of the court of appeals is plainly correct. The court properly construed two provisions of the Statute: 5 U.S.C. 7106(a)(2)(B), which preserves to management the authority to make determinations with respect to contracting-out in accordance with applicable laws, and 5 U.S.C. 7121, which authorizes a broad scope negotiated grievance procedure that mandatorily excludes only five

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[6] Senior Judge MacKinnon would have granted the petition for rehearing; Judges Bork, Scalia, and Starr would have granted the suggestion for rehearing en banc (Pet. App. 38a-39a).

subject matters, none of which involve contracting-out. Moreover, the court's decision does not conflict with any decision of this Court or any court of appeals.[7] Therefore, the decision does not warrant review by this Court.

1. Petitioner acknowledges (Pet. 9 n.4) that it is required to make contracting-out determinations in accordance with the Circular and any other applicable laws and regulations. Nonetheless, petitioner contends (Pet. 13) that language which would embody this requirement in a collective bargaining agreement is nonnegotiable because it would affect the authority of agency management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). However, petitioner is incorrect because, as the court of appeals correctly found, the proposal "does not of itself establish any substantive criteria guiding management's contracting-out determinations," and thus "does not affect management's reserved authority, within the meaning of the statutory language, to make contracting-out decisions" (Pet. App. 9a).

As the court of appeals properly concluded, "[b]ecause the [Statute] does not grant to management unqualified authority to contract-out, union proposals touching upon that authority are not automatically rendered nonnegotiable. Rather, management may refuse to bargain over only those proposals that would expand upon the restrictions contained

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[7] Petitioner's suggestion (Pet. 23 n.20) that a conflict among the circuits could never arise on this issue is in error. Any Authority order requiring an employing agency to bargain over a similar union proposal would be subject to judicial review "in the circuit in which the [agency] resides or transacts business." 5 U.S.C. 7123(a). In this regard, a case involving the negotiability of a bargaining proposal that would require correction of in-house estimates that are not prepared in accordance with existing contracting-out directives is pending in the Ninth Circuit. *Defense Language Institute* v. *FLRA*, Nos. 84-7498 and 84-7610 (argued Mar. 11, 1985).

in the [Statute]" (Pet. App. 8a-9a).[8] The proposed contract language found negotiable in this case would not expand upon those restrictions; rather, it reserves to management the full range of discretion available to it under law, which is precisely the same range of discretion reserved to management under Section 7106(a)(2)(B).[9]

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[8] Petitioner's characterization of the Statute, as "render[ing] nonnegotiable any bargaining proposal that would affect substantive agency decisions involving contracting out for goods and services" (Pet. 13), is incomplete. What the Statute reserves to management as nonnegotiable is the authority, subject to the obligation to bargain created by 5 U.S.C. 7106(b)(2) and (b)(3), to make contracting-out determinations which are *in accordance with applicable laws*. Petitioner's attempt (Pet. 16) to attribute a meaning to "in accordance with applicable laws" different from that found by the court (Pet. App. 8a) is not only articulated for the first time in this case in this petition, but is without support in the Statute or its legislative history.

[9] By contrast, the Authority has found nonnegotiable proposed language that would not reserve to management the same range of discretion allowed to it under law. *E.g., National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom., NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982) (proposal which would have locked management into observing specific terms derived from the Circular without allowing for the possibility that the Circular could be revised or rescinded); *AFGE, Local 3403 and National Science Foundation*, 6 F.L.R.A. 669 (1981) (proposal which would have required that contracting-out determinations be "fair, equitable, and in accordance with established policy" would have constricted management's discretion beyond the externally imposed limitation to comply with applicable laws and regulations). Furthermore, consistent with this principle and contrary to petitioner's argument (Pet. 18 n.14), the Authority, in *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (1985) (slip op. 6), found a proposal nonnegotiable because the proposal "requires that contracting-out decisions be made in accordance with provisions of the parties' collective bargaining agreement and the Union is seeking to include provisions in the parties' agreement which would establish substantive limitations on management's authority."

Thus, contrary to petitioner's argument (Pet. 14-15), it is precisely the exercise of management's judgment with respect to the discretionary aspects of the contracting-out determination that is preserved as nonnegotiable by the Statute. As the Authority and the court of appeals properly found, the proposal does not infringe on that discretion.[10] Irrespective of any contract language, management contracting-out decisions must be made within the bounds of law and regulation. There is simply nothing about the proposal which interferes with a management contracting-out decision made within those bounds.[11]

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[10] Moreover, an arbitrator, in resolving a grievance under the provision, may not apply the provision in a manner inconsistent with the Circular's reservation of discretion to the agency. Thus, to the extent that the Circular reserves discretion to the agency, an arbitrator's award may not interfere with that discretion. See, *e.g., U.S. Department of Justice, Federal Prison System and AFGE, Council of Prison Locals, Local 1741,* 15 F.L.R.A. No. 178 (1984); *AFGE, Local 1917 and United States Immigration and Naturalization Service,* 15 F.L.R.A. No. 147 (1984) and cases cited therein; *PATCO and FAA,* 5 F.L.R.A. 763 (1981). See also *AFGE, Local 1968* v. *FLRA,* 691 F.2d 565, 573-574 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).

As the cited cases demonstrate, the Authority is responsible under the Statute for resolving exceptions to arbitrators' awards, and for taking appropriate corrective action if upon review the Authority finds that the award is deficient because, *inter alia,* the award is contrary to any law, rule, or regulation. 5 U.S.C. 7122(a) and 5 U.S.C. 7105(a)(2)(H). With respect to the arbitration awards cited by petitioner (Pet. 22 n.19), in each of those cases the Authority has granted the agency's request for a stay of the award pending resolution of the exceptions by the Authority. We are lodging with the Clerk of the Court, and providing to counsel for the other parties, copies of these Authority stay orders. See 5 C.F.R. 2429.8. See also *U.S. Soldiers' and Airmen's Home, Washington, D.C.,* 15 F.L.R.A. No. 26 (1984), petition for review pending, *AFGE, Local 3090* v. *FLRA,* No. 84-1439 (D.C. Cir. argued May 2, 1985).

[11] Petitioner argues that arbitral review would interfere with government efficiency (Pet. 9-10) and Executive authority (Pet. 19). However, it would appear that the possibility of arbitral and Authority review of a contractual provision that simply restates what the OMB Circular already requires management to do would have the opposite effect by encouraging compliance with the Circular.

2. Petitioner argues (Pet. 17-18) that subjecting any aspect of management's contracting-out actions to the negotiated grievance procedure is inconsistent with the Statute's preservation of management's nonnegotiable authority to make determinations, in accordance with applicable laws, with respect to contracting-out. However, as the court of appeals correctly concluded, this argument is "contrary to the text of the [Statute]" (Pet. App. 12a) because "a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause" (Pet. App. 14a; footnote omitted).

In the Statute, Congress required that "any collective bargaining agreement shall provide procedures for the settlement of grievances." 5 U.S.C. 7121(a). As the court of appeals correctly found, and absent agreement otherwise by the parties,[12] the Statute "expansively defines the subjects covered under the statutory grievance procedure" (Pet. 12a).[13] 5 U.S.C. 7103(a)(9). See *AFGE, Locals 225, 1504,*

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[12] Pursuant to 5 U.S.C. 7121(a)(2), the parties are free to bargain over excluding any matter from the application of the negotiated grievance procedure. In this way, management, if it chooses, can bargain to exclude grievances with respect to contracting-out from the scope of the negotiated grievance procedure. See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983). Moreover, "[i]n collective bargaining, government managers are presumably competent to look out for government interests." *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

[13] Petitioner's argument (Pet. 17 n.13) that the Statute's definition of "grievance" does not bring within the negotiated grievance procedure a grievance by an employee adversely affected by management's decision to contract out is in error. Congress defined grievance as including any complaint concerning "any matter relating to the employment of [an] employee." 5 U.S.C. 7103(a)(9)(A) and (B). Further, and as the court of appeals correctly pointed out (Pet. App. 13a n.18), petitioner ignores this definition and proceeds to constrict improperly the one definition of grievance analyzed, *i.e.*, a claimed violation of regulations

and 3723 v. *FLRA*, 712 F.2d 640 (D.C. Cir. 1983). Most important, as the court of appeals properly found, "[a]n allegation that EEOC failed to comply with the OMB Circular, or with any other law or rule governing contracting-out, plainly falls within this expansive definition" (Pet. App. 13a; footnote omitted).[14]

"affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). "Conditions of employment" means "personnel policies, practices, and matters * * * affecting working conditions." 5 U.S.C. 7103(a)(14). Petitioner's approach would confine the phrase "matters affecting working conditions" to only work hazards and work surroundings, and petitioner provides no basis for doing this. Petitioner's approach also ignores the fact that the term "conditions of employment" includes personnel policies and practices, as well as matters affecting working conditions, and as the court of appeals stated, contracting-out decisions, which may result in employee layoffs, "undoubtedly fall under the umbrella of personnel policies or practices" (Pet. App. 13a n.18).

[14] Petitioner overlooks this statutory scheme. In so doing, petitioner also ignores the fact that, in the Statute, Congress created a central and special role for negotiated grievance procedures and grievance arbitration that departed significantly from the scope and role of negotiated grievance procedures mandated by the pre-Statute labor relations program. Specifically, Congress mandated that negotiated grievance procedures be "fair and simple," provide for "expeditious processing" of grievances, and culminate in binding arbitration for unresolved grievances. 5 U.S.C. 7121(b). Under the pre-Statute labor relations program, negotiated grievance procedures were not required to be binding and were not allowed to be as broad in scope because they were required to exclude matters for which a statutory appeal procedure existed. See Labor-Management Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *Legis. Hist.* 1283, 1314-1319. Petitioner's reliance (Pet. 18 n.14) on the nature of the negotiated grievance procedure authorized under the pre-Statute labor relations program ignores the fact that Congress, in authorizing a broad scope for negotiated grievance procedures and in requiring that grievance arbitration be binding, significantly changed the nature of, and the role served by, the negotiated grievance procedure in federal-service labor management relations.

Moreover, these provisions of the Statute reveal the favor with which Congress viewed the negotiated grievance procedure and binding arbitration for the federal sector labor-management relations program.

Section 7121(c) limits the permissible reach of a negotiated grievance procedure by statutorily removing only five specific matters from that reach; management's contracting-out determinations is not one of the matters removed. Further, Section 7121(c) was used by Congress when it wanted to make an aspect of a nonnegotiable right also nongrievable.[15] In the instant case, despite the specific congressional awareness of, and the desire to make nonnegotiable, the right of management to make contracting-out determinations in accordance with applicable laws, Congress did not make those determinations nongrievable.[16]

See, *e.g.*, 124 Cong. Rec. 29182 (1978), *reprinted in Legis. Hist.* at 923, (remarks of Cong. Udall) ("[T]he arbitration provision I view as much of a gain for management as for labor. The Federal managers now, instead of having to go through difficult, complex appeal procedures, will be able to submit them to arbitration, and this is a gain for management."); 124 Cong. Rec. 25722 (1978), *reprinted in Legis. Hist.* at 856, (remarks of Cong. Ford) ("Binding arbitration • • • has worked well as an expeditious, credible and cost-effective means of dispute resolution."). See also *Devine* v. *White*, 697 F.2d 421, 435 (D.C. Cir. 1983) (discussing bases for arbitration's acceptance in federal sector employment).

[15] For example, the right to discipline employees is a nonnegotiable management right (5 U.S.C. 7106(a)(2)(A)). However, Section 7121(c)(3) prohibits only the grievance of an employee removal that has been taken for national security reasons. Employee discipline which has been taken for other reasons remains grievable. See 5 U.S.C. 7121(e); see also, *National Treasury Employees Union* v. *FLRA*, 712 F.2d 669 (D.C. Cir. 1983); 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924. Further, disputes over whether management has made a valid selection for a vacant position fall within the scope of the negotiated grievance procedure even though the right to make selections for employee positions is a nonnegotiable management right (5 U.S.C. 7106(a)(2)(C)). *E.g.*, *AFGE, Local 12 and U.S. Dep't of Labor*, 15 F.L.R.A. No. 113 (1984).

[16] Petitioner argues (Pet. 21 n.18) that courts have previously removed disputes from the jurisdiction of the negotiated grievance procedure. However, in each case cited by petitioner, it has been a category of employee, not a general subject matter, that has been removed; and in each case, the basis for removal stemmed from a conflict between two separate statutes. No court has removed a general subject matter

Accordingly, the court of appeals correctly concluded that "[t]he statutorily defined grievance procedure therefore encompasses a claim that a contracting-out determination was not made in accordance with law" (Pet. App. 15a) and the "adoption of the proposal in no way expands an employee's right to challenge management's contracting-out decisions under the grievance procedure" (Pet. App. 15a-16a; footnote omitted).

3. Finally, petitioner argues (Pet. 19-21) that the proposal is nonnegotiable because it conflicts with the Circular's language that the Circular's provisions "shall not be used to create" any new right of appeal. However, this argument was properly rejected by the court of appeals.

As the court of appeals correctly found, the proposal is not inconsistent with the Circular because the proposal does not "create" any new right of appeal. While the Circular specifies that the terms of the Circular "shall not be construed to create[ ] any substantive or procedural" right of appeal (44 Fed. Reg. 20558 (1979)), the right to file grievances regarding contracting-out is created not by the Circular but by the broad scope negotiated grievance procedure authorized by Congress in this labor-management statute. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640 (D.C. Cir. 1983). As the court of appeals and the Authority correctly held, the Statute itself, not this proposal, brings contracting-out determinations within the ambit of the negotiated grievance procedure.

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from the scope authorized by Congress for negotiated grievance procedures. Of course, Congress could have chosen to exclude matters relating to contracting-out determinations from the permissible scope of a negotiated grievance procedure. The simple fact, however, is that it did not do so. Petitioner's argument is more appropriately directed to Congress. See, *e.g.*, *AFGE, Council of Prison Locals, Local 1286* v. *U.S. Dep't of Justice*, 738 F.2d 742, 747 (6th Cir. 1984) *(quoting Griffith* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982)); *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1502 n.9 (D.C. Cir. 1984).

Second and, "more important[ly]," even if there were an inconsistency between the Circular and the Statute, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure. To allow the text of the Circular to restrict the scope of grievances would place 'limitations in the statute not placed there by Congress'" (Pet. App. 16a; citation omitted). Thus, the court of appeals correctly rejected petitioner's argument that the Circular should override the operation of rights flowing directly from the Statute.[17] There is simply no indication in the Statute or its legislative history that Congress intended to permit the specific rights created by the terms of the Statute to be superseded by administrative regulation.[18]

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[17] On the one hand, petitioner seeks to have this regulation override the terms of the Statute. On the other hand, and for the first time in this case, petitioner suggests (Pet. 18-19) that this regulation does not qualify as an "applicable law" within the meaning of Section 7106 or as a "law, rule, or regulation" within the meaning of Section 7103(a)(9).

[18] In arguing that the Circular should override the Statute's specific authorization of a broad scope negotiated grievance procedure, petitioner misconstrues Section 7117(a)(1) of the Statute. Section 7117(a)(1) authorizes "the issuance of governmentwide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible" under the Statute. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 155 (1978), *reprinted in Legis. Hist.* at 823. This section prevents parties from acquiring, through their negotiations, rights and obligations that are inconsistent with provisions of a governmentwide rule or regulation. Contrary to petitioner's argument, Section 7117(a)(1) does not apply to proposals which simply incorporate into the contract rights and obligations existing independently by operation of law. Were it otherwise, government-wide regulations, under the guise of Section 7117(a)(1), would be able to supersede rights specifically conferred by Congress in other provisions of the Statute, a result which neither the Statute nor its legislative history supports.

CONCLUSION

The petition for a writ of certiorari should be denied.[19]
Respectfully submitted.

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JUNE 1985

[19] "I authorize the filing of this brief in opposition to the petition for a writ of certiorari. Rex E. Lee, Solicitor General."

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No. 84-1728

In the Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a federal agency's compliance with Office of Management and Budget Circular A-76, an Executive Branch management policy directive establishing guidelines for contracting out functions to private enterprise, is a mandatory subject of negotiation under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (Pet. App. 40a-48a) is reported at 10 F.L.R.A. 3.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on September 21, 1984, and a timely petition for rehearing was denied on December 3, 1984 (Pet. App. 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to

and including May 2, 1985. The petition was filed on that date and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, are reproduced in the appendix to this brief.

STATEMENT

1. a. In October 1978 Congress enacted the Civil Service Reform Act of 1978 (the Act), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII of the Act, 5 U.S.C. 7101 *et seq.*, governs labor-management relations, including collective bargaining, for nearly all federal agencies. Title VII replaced the federal labor relations program that was created in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.), and that was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.). See 5 U.S.C. 7101 note.

Under the Act, a federal agency is required to bargain in good faith with a federal employee union about conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). See generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 91-92 (1983). "[C]onditions of employment" are defined, with several exceptions not relevant here (see 5 U.S.C. 7103(a)(14)(A)-(C)), as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). The Act also provides that if an impasse in bargaining is reached, either party to the negotiations may ask the Federal Service Impasses Panel (the Panel) to intervene.

5 U.S.C. 7119(c). The Panel has the authority to judge a proposal on its merits and to order its adoption by the parties. 5 U.S.C. 7119(c)(5)(B) and (C); see 5 C.F.R. 2471.11(a). Thus, a determination that a bargaining proposal is negotiable carries with it the possibility that the proposal ultimately will be incorporated as part of the collective bargaining agreement pursuant to an order of the Panel. See *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984); *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983).

The Act also creates a mechanism for the resolution of "grievances," a term that is defined to include complaints alleging violations of a collective bargaining agreement or otherwise relating to employment, 5 U.S.C. 7103(a)(9)(A), (B) and (C)(i), as well as "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). Under 5 U.S.C. 7121(a), all collective bargaining agreements must contain procedures for resolving grievances. The statute generally provides that grievances may be resolved through those negotiated grievance procedures, except for matters that specifically are made nongrievable by the contract. 5 U.S.C. 7121(a)(2). Grievances that cannot be resolved satisfactorily by the parties through the negotiated procedure are subject to binding arbitration. 5 U.S.C. 7121(b)(3)(C).[1]

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[1] The Act makes the negotiated grievance procedure the exclusive mechanism for resolving most of the grievances that fall within its coverage. 5 U.S.C. 7121(a)(1). Grievances that involve discrimination (see 5 U.S.C. 2302(b)(1)) or adverse action (see 5 U.S.C. 4303, 7512), however, may be resolved either through the negotiated procedure or through

While the Act thus makes many matters negotiable and arbitrable, it also reserves the exercise of certain rights to agency management. In 5 U.S.C. 7106(a), the Act provides that "nothing in [Title VII] shall affect the authority of any management official of any agency" to exercise a number of enumerated management prerogatives, including the right "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106 (a)(2)(B). An agency's duty to bargain with respect to these reserved rights is limited to the "procedures which management * * * will observe in exercising" the rights and "appropriate arrangements for employees adversely affected" by exercise of the rights. 5 U.S.C. 7106(b)(2) and (3). The Act also precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation," and over any "matters which are the subject of * * * a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).

Finally, the Act establishes the Federal Labor Relations Authority (FLRA or Authority) as an independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process and the grievance and arbitration machinery established by Title VII. Among other responsibilities, the Authority adjudicates negotiability disputes and unfair labor practice complaints, and reviews arbitral awards. 5 U.S.C. 7105(a)(2) (A)-(I). The Authority may seek enforcement of

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a separate, statutory appeals mechanism. 5 U.S.C. 7121(d) and (e). See *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985), slip op. 2-3. The Act also entirely excludes certain other matters from the negotiated procedure. 5 U.S.C. 7121(c).

its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by FLRA orders may seek judicial review in the courts of appeals, 5 U.S.C. 7123(a), although certain Authority orders concerning exceptions to arbitral awards are not directly reviewable in court. 5 U.S.C. 7123(a)(1).

b. Office of Management and Budget (OMB) Circular A-76 is a management policy directive applicable to Executive Branch agencies. Issued pursuant to delegated presidential management authority,[2] the Circular establishes "the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using Government facilities and personnel." 44 Fed. Reg. 20557 (1979).[3]

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[2] In addition to its budgetary and legislative functions, OMB serves as "the President's principal arm for the exercise of his managerial functions." 31 U.S.C. 501 note.

[3] The longstanding policy of the federal government to foster economy by acquiring needed goods and services from the private sector whenever it would be feasible and efficient to do so was first recognized officially in Bureau of the Budget Bulletins, issued in 1955, 1957 and 1966. In 1967, this policy was expressed and implemented in a directive known as Circular A-76. See 44 Fed. Reg. 20558 (1979). The Circular was revised substantially in 1979. *Id.* at 20556. It has been amended in several respects since then. See 45 Fed. Reg. 69322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37114 (1983); 50 Fed. Reg. 32812 (1985). The 1979 version of the Circular was in effect at the time of the contract negotiations in this case. In recent years Circular A-76 and amendments thereto have been published in the notice section of the Federal Register. The supplement to the current version of the Circular was not published because

It thus prescribes the steps that agencies should follow in making the cost analyses that shape the decision whether to contract out to private industry for goods and services the government needs, or to retain performance of a function in-house.

The Circular also provides that it "does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular," except as provided in the Circular itself. 44 Fed. Reg. 20558 (1979). See also 48 Fed. Reg. 37114 (1983). The Circular directs each agency to establish an appeals procedure that protects "the rights of all affected parties—Federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives." 44 Fed. Reg. 20561 (1979). Under such procedures, a party interested in an initial agency contracting-out determination may file an objection; an impartial agency official, at a level organizationally the same or higher than the official who approved the original decision, must rule on any objection within 30 days. The Circular provides that the decision on appeal is "final" and that the appeals "procedure and agency determinations may not be subject to negotiation, arbitration, or agreements." *Ibid.*[4]

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of its length, however; copies of the supplement have been lodged with the Clerk of the Court and provided to counsel for respondents.

[4] At the time the appeals procedure first was included in Circular A-76, OMB explained that it was designed to "promote more effective and consistent implementation" of the Circular and to "provide a level of visibility and discipline

2. a. In 1980, during the course of contract negotiations with the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (the Union) proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

Pet. App. 40a. The EEOC took the position that the duty to bargain in good faith did not extend to the Union's proposal and that bargaining on such matters "would be inconsistent with law, rule and regulations" (C.A. App. 9). It also stated that because "the Circular is a policy statement, * * * the authority vested with the agency head cannot be shared with an exclusive labor-organization or subjected to any third party determinations" (*id.* at 13). The Union subsequently submitted the proposal to the FLRA for a negotiability determination (*id.* at 1-2).

The FLRA ruled that the Union's proposal was negotiable (Pet. App. 40a-43a). The Authority recognized that the proposal addressed a subject listed in the management rights provision of the Act, 5

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that should significantly enhance implementation." 44 Fed. Reg. 20557 (1979). The appeals procedure provisions now are found in the supplement to Circular A-76 (at I-14 to I-15). Under the current procedure, a party affected by an agency decision to contract out may request detailed documentation supporting the agency's cost comparison analysis; appeals must be filed within 15 days of receipt of the documentation. As in the 1979 version of the Circular, a decision must be rendered within 30 calendar days of receipt of the appeal.

U.S.C. 7106(a) (Pet. App. 40a-41a). The Authority nevertheless concluded that bargaining about—and adoption of—the proposal would not contravene that provision, because the Union's position "would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management" (*id.* at 41a).

The Authority also acknowledged that bargaining about the Union proposal ultimately could result in subjecting disputes about compliance with Circular A-76 to the grievance and arbitration process, in apparent conflict with the exclusive appeals procedure provided in the Circular (Pet. App. 42a). It concluded, however, that even assuming the existence of a conflict between the proposal and the Circular—and assuming as well that the Circular fit within Section 7117(a)(1)'s definition of a "Government-wide rule or regulation"—the Circular could not "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in original).[5]

b. A divided panel of the court of appeals enforced the order of the Authority (Pet. App. 1a-37a).

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[5] The Authority also found "essentially procedural" and hence negotiable under 5 U.S.C. 7106(b)(2) a proposal that the EEOC notify the Union of its intention to solicit bids for contract work that could result in reductions-in-force or transfers affecting employees. Pet. App. 43a-44a. But the Authority found nonnegotiable a proposal that would have required the EEOC to minimize the effect of contracting-out decisions on employees, explaining that the proposal would interfere with management's statutorily reserved right to lay off employees. Pet. App. 45a-47a. Neither of these determinations is at issue at this stage of the proceedings.

The court concluded that the Union proposal would not unduly restrict management's reserved right to make contracting-out determinations, for two reasons. First, the court reasoned that the phrase "in accordance with applicable laws," which appears in the management rights clause, 5 U.S.C. 7106(a)(2), operates to restrict the authority reserved to management. Because the EEOC must comply with such laws, the court opined—and because, in the court's view, Circular A-76 is a "law" within the meaning of Section 7106(a)(2)—"[a]ny restriction imposed by the proposal on management's contracting-out authority * * * stems from the Act's mandate" (Pet. App. 9a). Thus, while agencies generally need not bargain with respect to their right to make contracting-out determinations, the court concluded that they are required to bargain about the duty to comply with all "applicable laws" affecting that right. *Id.* at 8a-11a.

Second, the court of appeals concluded that the Union proposal would not divest management of any existing control over the contracting-out process. The court believed that a union claim that management had failed to comply with Circular A-76's contracting-out guidelines would fall within the statutory definition of a grievance, 5 U.S.C. 7103(a)(9), and that arbitrators therefore would have jurisdiction to decide such claims even if there were no collective bargaining agreement provision requiring compliance. Pet. App. 11a-16a. In essence, the court reasoned that the Union *already* has the right to take to arbitration claims of noncompliance with the Circular. *Id.* at 12a, 15a-16a.

The court of appeals also rejected the EEOC's argument that the Union proposal is not a proper sub-

ject of bargaining because it is inconsistent with the exclusive appeals procedure established by Circular A-76. In the court's view, Title VII does not permit the text of the Circular to restrict the scope of a grievance mechanism created under the Act. Pet. App. 16a-17a.

Judge MacKinnon dissented (Pet. App. 18a-37a). He concluded that the Union proposal conflicted with the plain language of the management rights provision because it required bargaining about the substantive policy-making criteria to be used by the agency in making contracting-out determinations (*id.* at 22a-26a): "[i]f (1) the Circular provides substantive criteria for contracting out, and (2) bargaining over substantive criteria for contracting out is prohibited by law, then (3) a collective bargaining proposal which purports to *require* an agency to meet substantive criteria is *not* negotiable" (*id.* at 24a, emphasis in original). Judge MacKinnon also rejected what he viewed as the court's suggestion that the Act's grievance provisions override its management rights clause (*id.* at 27a-29a). And he maintained that, in any event, alleged violations of Circular A-76 would not be statutorily grievable in the absence of a contractual provision requiring compliance with the Circular, because in his view the Circular does not "affect[] conditions of employment" within the meaning of 5 U.S.C. 7103(a)(9) (Pet. App. 29a-36a).

The court of appeals denied the EEOC's petition for rehearing with suggestion for rehearing en banc. with Judges Bork, Scalia, and Starr dissenting from denial of the suggestion for rehearing en banc (Pet. App. 38a-39a).

SUMMARY OF ARGUMENT

A. 1. Title VII's management rights clause, 5 U.S.C. 7106, provides that "nothing" in Title VII "shall affect the authority of any management official in any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out." On its face, this provision renders nonnegotiable any bargaining proposal that, if adopted, would affect agency contracting out decisions. The Union's proposal in this case—which is intended to subject to arbitral review all such decisions—cannot be squared with the statutory language. The delay and increased expense that would follow from reviewability would, in the language of the statute, "affect" management authority. And this problem is compounded by the likelihood that arbitral second-guessing of agency decisions would be shaped by the norms of industrial relations rather than by simple fidelity to the requirements of the Circular. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 54, 56-57 (1974).

2. The court of appeals sought to avoid this conclusion by noting that, under Section 7106(a)(2), certain reserved management rights (including the right to contract out) must be exercised in "accordance with applicable laws." Circular A-76, the court continued, is such a law. Because agency managers must comply with applicable laws regardless of whether they are embodied in a contract, the court held that incorporating Circular A-76 into the contract would not affect management authority, and thus would not run afoul of Section 7106. The court's reasoning, however, is fundamentally flawed, for several reasons.

First, Circular A-76 is not an "applicable law" within the meaning of Section 7106(a)(2); indeed, it is not a "law" at all that is enforceable in any forum. Instead, the Circular is a presidential management directive that is no different in principle from policy advice on the management of the Executive Branch given directly from the President to one of his officers. Whether an agency manager is "complying" adequately with a policy directive of this sort can be determined only by the President or his designee. The Circular thus is interpreted and enforced internally, ultimately through the President's authority over his subordinates, see, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926); as the Circular itself explicitly provides, it does not create rights that can be asserted by third parties. A contrary conclusion would make judges or arbitrators—rather than the President himself—the final arbiters of whether agencies are in compliance with the President's policy directives. Absent some powerful indication to the contrary in the statute or its legislative history, it is implausible to suggest that Congress, through its recognition that management prerogatives must be exercised in accordance with "applicable laws," intended for the first time to give unions and union members that sort of unique role in the management of the Executive Branch.

Second, even if Circular A-76 could be characterized as a "law," it plainly is not a law that imposes external constraints on the exercise of management rights. While the Circular directs management towards a particular goal, the nature of the Circular's implementation is itself committed to the agency. Virtually every determination that precedes the ultimate contracting out decision—from the question whether the activity at issue is one that can be en-

trusted to private contractors to the calculation of the cost of performing a service in-house—involves an exercise of agency judgment. For this reason, both the courts and the Merit Systems Protection Board have held that application of the Circular is not subject to judicial review because it is committed to agency discretion by law. When Congress acknowledged in Section 7106(a)(2) that there are external restrictions on management discretion, then, it could not have had in mind directives like Circular A-76; there surely is no reason to believe that Congress intended to entrust arbitrators with the authority to make determinations that the courts have found to be beyond their own competence.

Third, the subjects addressed by Circular A-76 are not of the kind that Congress believed appropriate for arbitral consideration. Under the executive order regime that preceded the enactment of Title VII, which made use of a management rights clause that was virtually identical to Section 7106(a)(2), it was understood that management rights were not infringed when arbitrators heard challenges to agency compliance with laws governing discipline and promotions—laws that had a direct and immediate impact on individual employees and on the agency's relationship with its workforce. In contrast, contracts during that period did not incorporate by reference, and arbitrators did not interpret, laws or regulations that related more generally to the manner in which the agency wished to conduct its operations. There is no evidence that Congress intended to depart from this understanding when it enacted Title VII. Yet the court of appeals' holding, which appears to assume that Section 7106(a)(2) makes negotiable and arbitrable all laws that bear in any way on the exercise of management rights, would turn Title VII into

a catch-all that can be used to test agency compliance with virtually any legal requirement.

Finally, even if the court of appeals were correct in holding that Circular A-76 is an "applicable law" that constrains the exercise of management rights within the meaning of Section 7106(a)(2), it erred in identifying the nature of the constraint. The Circular has a procedural aspect: its exclusive, expedited grievance procedure, which provides for intra-agency review of challenges brought by all concerned parties. If the Circular constrains agency discretion, it does so only to the extent that contracting-out decisions may be challenged within the agency. By the Circular's own terms, management has "surrendered" its authority only to that extent.

B. The court of appeals supported its holding that the Union's proposal is negotiable by looking to the nature of Title VII's grievance machinery. Grievances—which are defined in the statute to include any claimed violation of a "law, rule, or regulation affecting conditions of employment"—may be resolved through a negotiated grievance mechanism unless the parties provide otherwise by contract. 5 U.S.C. 7103(a)(9)(C)(ii), 7121(a). Pointing to these provisions, the court reasoned that claimed violations of the Circular are grievances that can be grieved and submitted to arbitration whether or not the contract between the Union and EEOC requires compliance with the Circular. The court therefore concluded that adoption of the Union's proposal would in no way affect management rights. Again, however, the court's expansive analysis misread Title VII.

As a threshold matter, Circular A-76 is not a "law, rule, or regulation" within the normal meaning of those terms, so that claimed violations of the Circular are not grievances. And even if they otherwise were

grievable, Title VII's management rights provision would bar application of the statutory grievance and arbitration procedure to disputes concerning compliance with Circular A-76. The nature of agency compliance with the Circular is a management right. And Section 7106(a) unequivocally provides that "nothing in this chapter [that is, Title VII] shall affect" management's authority to exercise its reserved prerogatives. The management rights clause thus constitutes an express limitation on the scope of the grievance and arbitration procedure, which is, of course, created elsewhere in Title VII. The grievance machinery in Title VII cannot trump the management rights provision; any other conclusion would mean that management rights are reserved only if arbitrators eventually agree with the decisions taken by management.

C. Finally, the court of appeals' holding cannot be squared with 5 U.S.C. 7117(a)(1), which provides that the duty to bargain exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation," and does not "extend to matters which are the subject of * * * a Government-wide rule or regulation." While Circular A-76 is not a rule or regulation within the ordinary meaning of those terms, Congress specifically intended that executive policy directives be treated as rules or regulations for purposes of Section 7117(a)(1). H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158-159 (1978).

Circular A-76 establishes its own exclusive, expedited appeals procedure; it also provides that contracting-out decisions are not subject to negotiation, arbitration or agreement. These provisions are critical to the contracting-out process established by the Circular. The Union's proposal, which is designed to

bring grievance and arbitration procedures to bear on complaints concerning application of the Circular, on its face is thus "inconsistent with * * * [a] Government-wide rule or regulation." Similarly, because contracting out is the "subject" of Circular A-76, it may not be discussed at the bargaining table.

ARGUMENT

AN AGENCY'S COMPLIANCE WITH INTERNAL EXECUTIVE BRANCH MANAGEMENT DIRECTIVES CONCERNING CONTRACTING OUT MAY NOT BE THE SUBJECT OF NEGOTIATION OR ARBITRATION UNDER THE CIVIL SERVICE REFORM ACT OF 1978

OMB Circular A-76 sets out the policies and procedures to be followed by Executive Branch managers when they consider whether to contract out to private industry for goods or services needed by the government. The Circular therefore addresses precisely the area that Congress intended to make the exclusive province of agency managers when it "include[d] a specific broad statement of management rights" in Title VII of the Civil Service Reform Act of 1978. H.R. Rep. 95-1403, 95th Cong., 2d Sess. 12 (1978). Yet the court of appeals held that agency compliance with Circular A-76 may be made the subject both of negotiation and of arbitration under the Act.

This decision in large part turns Title VII on its head. Pointing to the management rights clause, it makes reviewable—for the first time—decisions taken under the internal management directives of the Executive. And it intrudes the processes of negotiation and arbitration into areas that Congress specifically reserved to management. In doing so, the court of appeals disregarded this Court's reminder that Con-

gress, in enacting Title VII, took pains "carefully [to] preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983), quoting 5 U.S.C. 7101(b).

A. The Management Rights Clause Bars Negotiation Over Contracting Out Decisions Made Pursuant To OMB Circular A-76

1. Title VII's management rights clause, 5 U.S.C. 7106, was enacted "to preserve the essential prerogatives and flexibility Federal managers must have." H.R. Rep. 95-1403, *supra*, at 43-44. See Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 923-924, 949 (Comm. Print 1979) (remarks of Rep. Udall) [hereinafter cited as *Legislative History*]. In particular, Section 7106(a) provides that "nothing" in Title VII "shall affect the authority of any management official of any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out."

On its face, this provision renders nonnegotiable any bargaining proposal that would affect substantive agency decisions relating to contracting out for goods or services.[6] It "requires the agency to retain

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[6] Congress carefully set out the exceptions to this blanket restriction in Section 7106(b), providing that negotiation is permissible "*at the election of the agency*, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work."

the right to make determinations with respect to contracting out work" (H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978)), and thus necessarily means that "a labor organization cannot bargain with agencies over * * * contracting out." *Legislative History* 840 (remarks of Rep. Clay). See H.R. Rep. 95-1403, *supra*, at 378 (supplemental views of Rep. Clay and six others).[7] The court of appeals' decision,

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Section 7106(b)(1) (emphasis added). Negotiation also is permissible on the procedures management will observe in exercising reserved management authority (Section 7106(b)(2)) and on "appropriate arrangements for employees adversely affected" by the exercise of management prerogatives (Section 7106(b)(3)).

Pointing to Section 7106(b)(2), the court of appeals suggested (Pet. App. 9a-10a n.12) that the Union's proposal might be negotiable because it is more procedural than substantive. The FLRA, however, did not find the proposal to be procedural in nature in the decision and order that it rendered in this case (although in another, subsequent decision it described the proposal here as "only procedural in nature," *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (Apr. 5, 1985), slip op. 6). In any event, as we show in text, the proposal would permit arbitrators to overturn agency contracting-out decisions on substantive grounds, and thus cannot be justified by reference to Section 7106(b)(2). See *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1400-1401 & n.3 (9th Cir. 1985) (proposal that would require correction of data not prepared in accordance with Circular A-76 is not procedural in nature, and therefore is nonnegotiable); Pet. App. 24a (MacKinnon, J., dissenting).

[7] See generally H.R. Rep. 95-1717, *supra*, at 153 ("the parties may not negotiate under any circumstances" about management rights); H.R. Rep. 95-1403, *supra*, at 43 (management rights "may not be subject to collective bargaining"); S. Rep. 95-969, 95th Cong., 2d Sess. 12-13 (1978) (management rights "are not subject to the collective bargaining process"); *Legislative History* 843, 932, 933 (remarks of

which mandates bargaining on precisely that subject (and thus, potentially, subjects agency decisions on contracting out to arbitral review[8]) cannot be squared with the statutory language. Indeed, the Ninth Circuit recently rejected the reasoning of the court below, holding that an agency's compliance with Circular A-76 cannot be the subject of negotiation. *Defense Language Institute* v. *FLRA*, 767 F.2d 1395 (9th Cir. 1985).

That the Union's proposal purports only to guarantee "compliance" with Circular A-76 does not change this conclusion, for the manner in which external directives are implemented often itself turns on an exercise of management discretion. In the language of the statute, arbitral review thus inevitably will "affect" the exercise of management authority under Circular A-76. At the outset, the very fact of reviewability will affect agency decisionmaking. Federal employee unions, of course, have an understandable economic interest in challenging decisions to contract out. And once they do so, the grievance and arbitration procedure, followed by FLRA review, will

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Rep. Clay); 935 (remarks of Rep. Derwinski); 954, 993 (remarks of Rep. Ford); 1012 (remarks of Sen. Percy). See also *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1143 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982); *Department of Justice* v. *FLRA*, 727 F.2d 481, 487 (5th Cir. 1984); *Customs Service* v. *FLRA*, 739 F.2d 829, 833 (2d Cir. 1984); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553, 560-561 (D.C. Cir. 1982).

[8] As we note above (at 2-3), if the Federal Service Impasses Panel orders inclusion of the Union proposal at issue here as part of the collective bargaining agreement, the Union will be permitted to file grievances challenging management determinations to contract out by alleging violations of the provisions of Circular A-76.

likely last for years (see cases cited at note 9, *infra;* Pet. App. 35a-36a).

The delays caused by this process will add to the expense of any contracting out decision, and may well make contractors reluctant to bid on government projects. Conversely, losses will result if an agency decides to proceed with a decision to contract out while a grievance is pending and an arbitrator later disagrees with the agency's judgment concerning application of Circular A-76, in the process ordering rescission of the contract and back pay for the displaced federal employees (and most likely necessitating the payment of damages to the displaced contractor).[9] The prospect of delay and added expense—

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[9] Arbitrators in several cases have ordered rescission of contracting-out determinations that were alleged to have been made in violation of guidelines modeled on those contained in Circular A-76. See *Naval Air Station, Whiting Field, and AFGE Local Union No. 1954,* FMCS No. 83K/06143 (Apr. 29, 1983) (requiring expenditure of approximately $400,000 in back pay); *Dep't of the Army, Oakland Army Base, and AFGE, Local 1157,* FMCS No. 83K/24072 (Nov. 26, 1984) (directing termination of contract, reinstatement of terminated employees, and back pay from date of termination to date of reinstatement); *U.S. Army Communications Command, Fort McClellan, and Local No. 1941, AFGE,* FMCS No. 83K/00570 (Aug. 9, 1983) (ordering agency to cease and desist from contracting out telephone services and implementing reduction in force pending proper notification to union and to reinstate any displaced employees); *U.S. Army Communications Command Agency—Redstone Arsenal and AFGE, Local 1858,* FMCS No. 83K/05094 (May 16, 1983) (contract must be cancelled until agency complies with arbitrator's interpretation of collective bargaining agreement provisions involving provision of documents to union); *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, and AFGE, Local No. 2840,* FMCS No. 82K/

which could significantly retard the contracting out process [10]—in some instances will preclude contracting out altogether. And in every case those considerations will have to be taken into account by agency managers, a development that unquestionably will distort their judgment.

More basically, the nature of the arbitral process inevitably will lead arbitrators to reject legitimate exercises of agency discretion under Circular A-76. This Court often has noted that arbitrators act to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960).[11] As

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20840 (Aug. 9, 1982) (ordering cancellation of procurement action). Exceptions to these awards have been filed with the FLRA but have not yet been resolved.

[10] OMB has estimated that delays due to arbitral review of contracting-out decisions will cause the government a loss in cost savings of approximately $142 million for the period 1986-1989.

[11] Thus, arbitral "judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and the arbitrator's] judgment whether tensions will be heightened or diminished." *Warrior & Gulf*, 363 U.S. at 582. See generally Meltzer, *Labor Arbi-*

a result, arbitral decisions are shaped by and reflect the law of the shop, "regardless of whether [the] contractual rights [at issue] are similar to, or duplicative of, the substantive rights secured by [legislation]." *Gardner-Denver*, 415 U.S. at 54. Indeed, labor arbitrators, who generally are chosen because of their knowledge of "the demands and norms of industrial relations" (*id.* at 57), may well "not be conversant with the public law considerations" that bear on questions involving issues of public policy. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981). It can be expected, then, that arbitral rulings on challenges to agency compliance with Circular A-76 will be grounded on considerations other than simple fidelity to the requirements of the Circular—a factor that will lead arbitrators to intrude upon the legitimate exercise of what are, under Section 7106, reserved management prerogatives.[12]

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tration and Overlapping and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30, 32-35 (1971); Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489, 1493-1507 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016-1024 (1955).

[12] It is unlikely that arbitral second-guessing of legitimate management decisions could be cured on review. While arbitral judgments are appealable to the FLRA, review by the Authority is not plenary (see 5 U.S.C. 7122); in any event, the "specialized expertise" of the FLRA—like that of arbitrators themselves—is "in its field of labor relations." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97; see *id.* at 92-93. And 5 U.S.C. 7123(a)(1) precludes direct judicial review of certain FLRA orders involving exceptions to arbitral judgments. The precise scope of permissible judicial review remains unsettled. See *Andrade* v. *Lauer*, 729 F.2d

2. The court of appeals did not take issue with these observations. It nevertheless was undisturbed by the predictable effect that the Union's proposal will have on management's right to contract out, reasoning that an agency's reserved management prerogatives are not absolute but rather are limited by Section 7106(a)(2)'s requirement that they be exercised "in accordance with applicable laws" ("nothing * * * shall affect [management] authority * * * in accordance with applicable laws * * * to make determinations with respect to contracting out"). Pet. App. 8a. Because agency managers must comply with applicable laws "regardless of whether the [Union's] proposal is adopted as part of the collective agreement" (*id.* at 9a), the court opined that permitting a *contract* also to require compliance with such laws would not infringe on management's reserved rights; it therefore held that Section 7106 does not forestall negotiations under Title VII directed at subjecting such compliance to arbitral review (*id.* at 8a-9a). The court found this reasoning dispositive here because the President, through OMB, has directed agencies to follow the policy guidance provided by Circular A-76.

The court's conclusion that the Circular is an "applicable law," however, is plainly wrong, for a number of independent reasons. Circular A-76 is not a "law" at all, and does not set down strictures of the sort that Congress would have believed to be subject to third party review in *any* forum. Moreover, the Circular does not impose any identifiable constraints on management. It does not address matters that

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1475, 1485 & n.16 (D.C. Cir. 1984); *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (9th Cir. 1983); *AFGE, Local 1923* v. *FLRA*, 675 F.2d 612 (4th Cir. 1982).

Congress intended to fall within the "applicable laws" rubric when it wrote Section 7106(a)(2). And, in any event, acting "in accordance" with the Circular requires use of the Circular's exclusive grievance procedure, rather than Title VII's arbitration mechanism.

a. Like most OMB Circulars, Circular A-76 is an executive management policy directive issued pursuant to presidential budgetary and management authority. Such directives are "intended primarily as * * * managerial tool[s] for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). As such, they are not designed to implement any specific legislative mandate; instead, Circulars such as the one at issue here are no different in principle from policy advice on the management of the Executive Branch given directly from the President to one of his officers. Circular A-76 thus is "binding" only in the sense that the President may choose to remove an Executive Branch officer who disregards its direction.

Whether an agency manager is "complying" with a presidential directive of this sort plainly cannot be determined by a third party. An officer's compliance with a presidential policy directive is adequate if the President determines that it is; the Circular thus is interpreted and enforced internally, ultimately through the President's authority over appointed officials. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926). It follows that, "inasmuch as the Circular * * * '[is] merely [an] internal operating procedure[], rather than [a] regulation[]

officially promulgated under the APA or otherwise, [it does] not prescribe any rule of law binding on [an] agency,' *Concerned Residents of Buck Hill Falls* v. *Grant*, 537 F.2d [29], 38 [(3d Cir. 1976)], and cannot be used as the basis for an attack upon [an agency's] decision." *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 582 n.28 (3d Cir. 1979). Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970). Circular A-76 itself acknowledges this point, expressly providing that it was not intended to create rights that can be asserted by third parties. See 44 Fed. Reg. 20558 (1979). Indeed, a reading of the Circular that found it to create cognizable rights would make third parties such as judges or arbitrators—rather than the President—the final arbiters of whether agencies have adhered adequately to the President's policy directives.

Given these considerations, it is not surprising that the courts have pointed to the nature of Circular A-76 in holding that it and related contracting-out guidelines do not create rights that are enforceable by third parties. Because the Circular is designed to provide agency managers with policy guidance on how they are to carry out their tasks, courts have reasoned that implementation of the Circular necessarily involves "managerial choices inherently unsuitable for the judiciary to consider." *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). And because the Circular "appear[s] to be primarily a loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat[ing] a legally enforceable stand-

ard." *Local 2855, AFGE*, 602 F.2d at 582 n.28. See *id.* at 580-581. Cf. *AFGE* v. *Hoffman*, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976); *Defense Language Institute*, 767 F.2d at 1401.

For these reasons, the court below erred in holding that use of the "applicable laws" term in Section 7106(a)(2) was intended to subject the implementation of Circular A-76 to negotiation and arbitration. In issuing that holding, the court essentially reached the ironic conclusion that Congress used the "applicable laws" language of the management rights clause to transform a tool of presidential management authority into an occasion for interference by outsiders into that management process. Absent some powerful indication to the contrary in the statute or its legislative history, however, it is implausible to suggest that Congress, through its recognition that management prerogatives must be exercised in accordance with "applicable laws," intended—for the first time—to give unions and union members a private right of action to oversee agency compliance with Circular A-76. Cf. *Cort* v. *Ash*, 422 U.S. 66, 82-84 (1975); *AFGE, AFL-CIO* v. *Carmen*, 669 F.2d 815, 822-826 (D.C. Cir. 1981).

b. The court of appeals' reliance on the "applicable laws" proviso in Section 7106(a)(2) also is flawed for another, more limited reason. Even if Circular A-76 could be characterized as a "law," an examination of the Circular indicates that it is not a law that limits the exercise of management discretion in any meaningful sense. Section 7106(a)(2) refers to regulations that impose constraints on the exercise of management authority. But while some of the calculations mandated by the Circular appear mechanical, the choices and analysis that guide the

Circular's implementation in almost every case involve a prior exercise of "judgment and managerial discretion." *Local 2855, AFGE*, 602 F.2d at 583. The Circular directs management efforts towards a particular goal; the nature of its implementation, however, is itself committed to management. When Congress acknowledged in Section 7106(a)(2) that there may be external restrictions on management discretion, then, it could not have had in mind directives like Circular A-76.

As a threshold matter, for example, the Circular provides that agencies must perform in-house all "governmental" tasks (48 Fed. Reg. 37114 (1983)) and those commercial activities that, in management's judgment, are related to the direction of "national defense" (*id.* at 37114, 37115; 44 Fed. Reg. 20558 (1979))—without defining either of those terms.[13] Similarly, in-house performance of a commercial activity is authorized if use of a private source would, again in management's judgment, "cause unacceptable delay or disruption of an essential program." 48 Fed. Reg. 37114 (1983).

The actual cost comparisons that are central to the contracting-out decision under the Circular also turn on determinations that are themselves exercises of agency judgment. Existing contracts must be subjected to a cost comparison analysis, for example, when "contract costs become unreasonable or performance becomes unsatisfactory." Supplement to

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[13] The Circular provides a non-exhaustive list of activities that generally are commercial in nature (48 Fed. Reg. 37115-37116 (1983)), but warns that "[a]gency management must used informed judgment on a case-by-case basis in making these decisions." *Id.* at 37115 n.1.

OMB Circular A-76, at I-2. The management study guide mandated by the Circular—which is used as "the basis of the Government estimate for the cost comparison with potential contractors" (*id.* at III-1) —does not "purport to replace the agencies[']' own management techniques," and in fact is intended to give agency management "freedom to be innovative and creative [in] develop[ing] a new organization." *Id.* at III-1, III-2. And as a prerequisite to its mandated cost analysis, the Circular directs management to develop a "staffing estimate" of the annual productive hours necessary to accomplish a given activity, while recognizing that there may be no way to make a precise estimate and that "informed judgment" is a "tool" to be used in the calculation. *Id.* at IV-7.

Decisions on each of these points "are matters on which experts may disagree; they involve nice issues of judgment and choice * * * which require the exercise of informed discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318 (1958). As noted above, the courts accordingly have recognized that the Circular "fail[s] to provide meaningful criteria against which a court may analyze the [agency's] decision" (*Local 2855, AFGE*, 602 F.2d at 581), and therefore have held that application of the Circular is not subject to judicial review because committed to agency discretion by law. See cases cited at page 25-26, *supra*. Cf. *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 10-11. Similarly, the Merit Systems Protection Board, the FLRA's companion agency in overseeing the federal personnel system, has held that it will not entertain a challenge to agency implementation of Circular A-76 because "[t]he evaluation of [comparative] costs is a matter committed by law to agency discretion." *Griffin* v.

Department of Agriculture, 2 M.S.P.B. 335, 337 (1980).

Against this background, it hardly can be doubted that "[t]he Circular's lack of definite guidelines to shape the exercise of [agency] discretion will result in arbitral review in which the arbitrator can substitute his judgment for that of the agency. * * * The operative effect of the union's proposal is to divest management of the essence of its statutory authority to contract out." *Defense Language Institute*, 767 F.2d at 1401. Cf. *United States Customs Service* v. *FLRA*, 739 F.2d 829, 831-833 (2d Cir. 1984) (even where regulations direct the development of criteria to control promotions, it is management's prerogative to choose the criteria); *AFGE, Local 1968* v. *FLRA*, 691 F.2d 565, 570-572 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983) (same as to performance standards); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553, 560-564 (D.C. Cir. 1982) (same). And there surely is no reason to believe that Congress intended to entrust arbitrators —whose competence, after all, "pertains primarily to the law of the shop, not the law of the land" (*Gardner-Denver*, 415 U.S. at 57)—with the authority to make determinations about the implementation of Circular A-76 that the courts have found to be beyond their own competence. In short, an external prescription that commits a matter to agency discretion cannot serve as a "law" that constrains management authority under Section 7106(a)(2).

c. In fact, when it recognized that management rights must be exercised in accordance with "applicable laws," Congress plainly had in mind a regime quite different from the one envisioned by the court of appeals. As conceived by Congress, management rights are not infringed when arbitrators apply laws

and regulations that affect employees as individuals, or that directly govern an agency's relationship with individual employees. These were the sorts of "applicable laws" that arbitrators had been empowered to interpret and apply under Executive Order 11491, which made use of a management rights provision virtually identical to Section 7106(a)(2).[14] In par-

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[14] The original management rights provision stated that "[m]anagement officials of the agency retain the right, in accordance with applicable laws and regulations," to exercise most of the management rights now enumerated in Section 7106(a)(2). Exec. Order No. 10988, § 7(2), 3 C.F.R. 525 (1959-1963 comp.), *reprinted at Legislative History* 1214. Most of the management rights now reserved in Section 7106(a)(1) were made nonnegotiable by the prior section of the Executive Order. Exec. Order No. 10988, § 6(b), 3 C.F.R. 524 (1959-1963 comp.), *reprinted at Legislative History* 1214. The "applicable laws" phrase was carried over intact into Exec. Order No. 11491, § 12(b), 3 C.F.R. 861 (1966-1970 comp.), *reprinted at Legislative History* 1251.

The management rights provisions in the executive orders were interpreted to permit negotiation about procedures concerning the exercise of management prerogatives and about the effect of the exercise of those rights on employees. See Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted at Legislative History* 1393. While issues bearing on these matters were grievable, arbitrators lacked the authority to interfere with the exercise of substantive management authority. Compare, *e.g.*, *Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO*, 5 F.L.R.C. 280 (1976) (arbitrator permitted to overturn a promotion where the agency failed to comply with the grievance procedure set forth in the parties' collective bargaining agreement) with *National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity*, 2 F.L.R.C. 293 (1974) (arbitrator lacked the authority to direct management to fill a vacancy). The negotiability of these matters has been preserved by Section 7106(b)(2) and (3).

ticular, arbitrators during the executive order regime considered challenges brought under regulations bearing on discipline and promotions—subjects that are central to any system of labor-management relations, and that are "applicable" to the workforce in a direct sense because they are designed to govern personnel matters. See, *e.g.*, *Dep't of the Army, Fort Richardson, Alaska and American Federation of Government Employees, Local 1712*, 6 F.L.R.C. 710 (1978); *National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama and Marshall Engineers and Scientists Ass'n Local 27, Int'l Federation of Professional and Technical Engineers, AFL-CIO*, 5 F.L.R.A. 741 (1977); *Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO*, 5 F.L.R.C. 280 (1976). See generally Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted at Legislative History* 1371. Arbitrators thus were authorized to set aside individual personnel decisions because doing so did not infringe management's right to determine basic policy or to structure agency operations.

In contrast, contracts prior to enactment of Title VII could not incorporate by reference agency regulations bearing on, for example, the types of employees that would be assigned to given projects, apparently because such decisions related less to the individual employee than to the manner in which the agency wished to conduct its business. See, *e.g.*, *AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma*, 5 F.L.R.C. 604 (1977). Cf. *AFGE Local 2118 and Los Alamos Area Office,*

ERDA, 8 F.L.R.C. 296 (1975). While the government's underlying policies relating to assignments (or to contracting out) obviously had an indirect effect on employees, the application of such policies generally was not negotiable or arbitrable because it involved a decision *precedent* to any impact on the workforce and basic to management's role.[15]

There is no evidence that Congress in enacting Title VII intended to depart from this understanding by permitting arbitrators to construe and apply laws that bear only indirectly on the employer-employee relationship. The "applicable laws" phrase was borrowed intact from Executive Order 11491 for use in the original House version of Section 7106, which reserved to management the right "in accordance with applicable laws, to take whatever actions as may be necessary to carry out the mission of [the] agency during national emergencies." H.R. 11280, 95th Cong., 2d Sess. § 7106(a)(2) (1978), *reprinted at Legislative History* 325-326. Additional management rights were added to Section 7106(a)(2) in committee and on the floor. See H.R. Rep. 95-1403, *supra*, at 43-44; *Legislative History* 924-925 (remarks of Rep. Udall). Despite extensive discussion at each of these points—and during debate on the

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[15] In its deliberations on Section 7106 Congress implicitly recognized that there is a distinction between hiring, discipline, and promotion decisions on the one hand, and decisions relating to the other reserved management rights on the other. The first group were omitted from the House version of Section 7106(a)(2) that was reported out of committee (see H.R. 11280, *supra*, § 7106(a) *reprinted at Legislative History* 391-392); they were added to the House bill on the floor immediately prior to passage in an attempt to strengthen the management rights provision. See *Legislative History* 924 (remarks of Rep. Udall).

corresponding provision of the Senate bill as well (see, *e.g.*, S. Rep. 95-969, *supra*, at 12)—about the nature of the reserved management prerogatives, Congress nowhere suggested that it intended to give the "applicable laws" phrase a function dramatically different from the one it had served during the executive order regime. Cf. *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 103 (recognizing the congruence of the executive order scheme and Title VII); *Legislative History* 923 (remarks of Rep. Udall) ("unions do not get much out of [Title VII] that is not already in the Executive order").[16]

Nonetheless, the court of appeals' ruling—which seems to assume that Section 7106(a)(2) makes negotiable and arbitrable all laws (and, for that mat-

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[16] To the contrary, Congress explained only that it intended to "exten[d]" the existing grievance provisions to permit "agencies and unions to negotiate grievance and arbitration procedures to cover * * * matters which may now be appealed only under statutory procedures under the Executive order." *Legislative History* 856 (remarks of Rep. Ford). Prior to 1978 there were approximately 20 of these so-called statutory appeals procedures, which permitted employees to challenge adverse action and other disciplinary decisions, hiring and promotion, and like personnel matters. See Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted at Legislative History* 1374-1376. The congressional intention to make matters of this sort grievable is manifested, for example, in Section 7121(e), which provides that adverse actions may be challenged either through the negotiated procedure or through an appeals process—a provision that reflects the fact "that Congress' primary focus in the [Act] was on adverse actions." *Lindahl* v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985), slip op. 23. The matters covered by a statutory appeals mechanism that Congress chose not to make grievable are enumerated in Section 7121(c). See note 21, *infra*.

ter, all Executive Branch policy directives) that bear in any way on the exercise of management rights—would have precisely that effect. Presumably, for example, it would allow an employee to complain that he would not have been reassigned had an agency employer complied with the National Environmental Policy Act, or with the Atomic Energy Act, or with an appropriations act. It would permit an arbitrator to determine agency compliance with such a statute. And it would do so in a setting in which direct judicial review often would not be available. See note 12, *supra*. "If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). Not surprisingly, Congress gave no indication whatsoever that this was its intention.

d. Finally, even if the court of appeals were correct in holding that Circular A-76 constrains the exercise of management rights under Section 7106(a)(2), it erred in identifying the nature of that constraint. The court reasoned that OMB has chosen to limit the discretion of agency managers, and that the government to that extent has surrendered its management prerogatives. The court failed to note, however, that there is a procedural aspect to Circular A-76: its exclusive, expedited grievance procedure, which provides for intra-agency review of challenges brought by all concerned parties, including contractors as well as federal workers. The Circular by its terms thus constrains management only to the extent that contracting-out decisions can be challenged within the agency. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *King*, 395 U.S. 1, 4 (1969).

Disregarding the procedural aspects of the Circular would significantly expand the limitation on management prerogatives that is worked by its substantive provisions. As we note above (at 19-20), the quick resolution of disputes that is ensured by the Circular's grievance procedures is critical to the success of the contracting-out process, because bid and other data must be current for cost comparisons to be valid. Indeed, the effect of third party review on the contracting-out process will differ markedly from its effect on agency decisions relating, for example, to compliance with laws concerning employee discipline or promotions. The prospect that a supervisor's disciplinary decision ultimately may be set aside is unlikely to affect his willingness to impose discipline in the first instance. But the delay caused by arbitral and FLRA review may itself foreclose the agency manager's option to contract out, while the prospect of added expense if his decision is overturned involves costs that go to the very nature of the contracting out decision—and that in a close case will lead a prudent manager to forgo the letting of an otherwise desirable contract. Cf. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1153 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

B. The Grievance Machinery Established By Title VII Of The Act May Not Be Used To Challenge The Exercise Of Management's Reserved Right To Contract Out

As the discussion above demonstrates, incorporation of the Union's proposal into the contract would have a sharp impact on the exercise of management rights. In disregarding this effect, the court of appeals relied in large part on its belief that claimed

violations of the Circular *already* are grievable and arbitrable under Title VII's grievance machinery.[17] This belief cemented the court's conclusion that negotiations about compliance with the Circular would not "affect" management prerogatives within the meaning of Section 7106(a). See Pet. App. 11a-16a.

Under 5 U.S.C. 7121(a), "grievances" may be resolved through the negotiated grievance mechanism—and ultimately through binding arbitration (see Section 7121(b)(3)(C))—unless the parties provide otherwise by contract. "Grievance" is defined elsewhere in Title VII, in relevant part (see note 19, *infra*), as "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). Claimed violations of Circular A-76 therefore are "grievances" that can be grieved and submitted to arbitration pursuant to these provisions, the court opined, whether or not the contract between the Union and EEOC specifically requires compliance with the Circular. Building on this conclusion, the court reasoned that "adoption of the [Union's] proposal in no way expands an employee's right to challenge management's contracting-out decisions under the grievance procedure" (Pet. App. 15a-16a, footnote omitted), and thus would not affect the exercise of

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[17] This reasoning evidently took the Union by surprise; as the Ninth Circuit recently noted, it is "incredible that the parties would so strenuously dispute a proposal that gives the union nothing it did not already possess and deprives management of nothing it had not already lost." *Defense Language Institute*, 767 F.2d at 1402. See also Pet. App. 37a n.19 (MacKinnon, J., dissenting) ("If, as the majority claims, it is entirely obvious from the statute that violations of the Circular are already grievable as a matter of law, why would the union waste its time, effort, and money in pursuing first the contract proposal and now this action?").

management rights. This expansive analysis, however—which stands as a central prop for the court's conclusion that the Union's proposal is an innocuous one—misreads Section 7106 and misstates the nature of Title VII's grievance mechanism.

1. As a threshold matter, the court of appeals erred in assuming that a claimed violation of the Circular is a grievance as defined by Section 7103(a)(9)(C)(ii). That provision addresses noncompliance with "any law, rule, or regulation." As noted above (at 24-26), however, Circular A-76 is an internal policy directive; it is not a law, rule, or regulation within the normal meaning of those terms. And Congress, in any event, undoubtedly intended Section 7103(a)(9)(C)(ii), like the "applicable laws" phrase in Section 7106(a)(2), to refer to strictures relating directly to personnel matters and to labor-management relations.[18] See pages 29-34, *supra*. Attributing a broader meaning to the terms "law, rule, or regulation" would have an extraordinary effect: it would, for the first time, subject decisions involving management policy directives to third party review, while *automatically* providing for arbitration (potentially without judicial review) of disputes involving every federal statute and regulation that arguably affects a unionized federal employee. Congress gave no indication that it intended to achieve such a result—and in that way to provide unions, but not non-unionized employees, with a unique role in managing the Executive Branch and with a private cause of action to

[18] That this was Congress's focus when it created the grievance mechanism is confirmed by the nature of the matters that Congress explicitly excepted from grievability in Section 7121(c): all involve issues bearing directly on personnel management. See note 21, *infra*.

challenge virtually every imaginable government decision. Cf. *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985), slip op. 13.[19]

2. In any event, even were disputes concerning compliance with Circular A-76 otherwise grievable, Title VII's management rights provision would bar application of the statutory grievance and arbitration procedure to such disputes. As explained above, the nature of an agency's compliance with the Circular's mandate is a reserved management right. And Section 7106(a) unequivocally provides that "nothing in this chapter [that is, Title VII] shall affect" management's authority to exercise its reserved prerogatives. Section 7106(a) thus constitutes an express limitation on the scope of the grievance and arbitration procedure, which is, of course, created elsewhere in Title VII. See *Defense Language Institute*, 767 F.2d at 1420. As Judge MacKinnon noted in dissent, "[i]t is absurd to construe the act to say that '*nothing*' in the rest of [Title VII] affects management's right, but that the rest of [Title VII] *does* affect that right." (Pet. App. 28a; emphasis in original). Indeed, the Authority itself only recently has recognized that a union proposal that "would extend the coverage of the negotiated grievance procedure to the decision to contract out itself * * * [is] incon-

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[19] The court of appeals also suggested that a claimed violation of the Circular might be a grievance under 5 U.S.C. 7103(a)(9)(A) and (B) as a "matter relating to the employment of [an] employee." Pet. App. 12a, 13a-14a n.18. But a claim of error in, for example, the construction of an economic estimate under the Circular plainly presents too remote an issue to be considered a matter relating to the employment of an employee; if it were not, Section 7103(a)(9)(A) and (B) would render Section 7103(a)(9)(C) entirely superfluous.

sistent with [5 U.S.C.] 7106(a)(2)(B)." *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (Apr. 5, 1985), slip op. 6.[20] Thus, the grievance machinery in Title VII cannot trump the management rights provision; any other conclusion would mean that management rights are reserved only if arbitrators eventually agree with the decisions taken by management.

That Congress did not mean to create such a circular system is confirmed by Title VII's legislative history. Under the pre-Act federal labor relations program, employees could not grieve "matters otherwise excluded from the negotiations by [the management rights clause of Executive Order 11491]." Labor-Management Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *reprinted at Legislative History* 1317. There is no indication that Congress meant to change that practice when it enacted Title VII. To the contrary, the Senate bill expressly provided in its proposed grievance provision that negotiated grievance procedures could "cover any matter within the authority of an agency *if not inconsistent with the provisions of this chapter*"—which included the management rights provision. S. 2640, 95th Cong., 2d

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[20] See also *AFGE, Local 1968 and Department of Transportation*, 5 F.L.R.A. 70, 79 (1981) ("[t]he plain language of section 7106 provides that 'nothing' in the Statute, *i.e.*, 5 U.S.C. 7101 *et seq.*, shall 'affect the authority' of an agency to exercise the rights enumerated therein. Therefore, no grievance procedure could be negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106"), enforced *sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983)).

Sess. § 7221(d) (1978), *reprinted at Legislative History* 533 (emphasis added). See S. Rep. 95-969, *supra*, 109-110 (1978). In fact, because the Senate bill left the scope of the grievance mechanism to be determined by "negotiation between the parties" (*id.* at 109)—and because management rights were not subject to negotiation—the Senate plainly did not envision that management rights would be grievable.

The House bill took a different approach: it would have required the negotiated grievance procedure to provide for the resolution of all grievances. See H.R. Rep. 95-1403, *supra*, at 55-56. This bill as well, however, was described as a "small, incremental step forward" from the executive order regime (*Legislative History* 855 (remarks of Rep. Ford)). And its proposed grievance mechanism did "not represent a change, but rather an extension of the well-tested provisions of the Executive order [to reach some matters that had been resolved under statutory appeal procedures]." *Id.* at 856 (remarks of Rep. Ford). See note 19, *supra*. As enacted, the grievance provisions reflect a compromise between the Senate and House approaches, providing that matters otherwise subject to the grievance mechanism are to be grievable unless the parties agree to the contrary. See H.R. Conf. Rep. 95-1717, *supra*, at 157. But the Conference Committee nowhere suggested in its brief discussion of the issue that all matters bearing on the exercise of management rights were, for the first time, being made grievable by operation of law.

The reading of the grievance provisions offered by respondents, however, would have precisely that effect. They submit that the only matters excepted from the statutory grievance procedure are the five relatively narrow subjects enumerated in 5 U.S.C.

7121(c), evidently in the belief that the management rights provision limits negotiability but not grievability.[21] Union Br. in Opp. 16; FLRA Br. in Opp. 15-16; see also Pet. App. 12a-13a. This approach, of course, entirely ignores the language of Section 7106(a), for "Congress did *not* say that management's reserved rights are *nonnegotiable*; it said, '*nothing in this chapter shall affect*' the right of the agency to make contracting-out decisions." *Defense Language Institute*, slip op. 11 n.7 (emphasis in original).[22] See also Pet. App. 28a-29a (MacKinnon,

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[21] These include claims relating to prohibited political activities (Section 7121(c)(1)); retirement and insurance issues (Section 7121(c)(2)); removals involving national security issues (Section 7121(c)(3)); examinations, certifications and appointments (Section 7121(c)(4)); and position classifications that do not result in the reduction in grade or pay of employees (Section 7121(c)(5)).

[22] This choice of language plainly was intentional. Section 7106 (which is titled "[m]anagement rights") thus contrasts with Executive Order 11491, which placed its management rights provisions in sections titled "[n]egotiation of agreements" and "[b]asic provisions of agreements." Exec. Order No. 11491, §§ 11, 12, 3 C.F.R. 861 (1966-1970 comp.), *reprinted at Legislative History* 1250-1251. Because the scope of the grievance provision was negotiated by the parties under the executive order regime (see Labor-Managment Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *reprinted at Legislative History* 1315-1316), limiting negotiability served to limit grievability; when Congress chose in Title VII to set the basic scope of grievability by statute, it was forced to modify the management rights provision to provide generally that management rights would not be "affect[ed]" by anything in Title VII.

The court of appeals opined that the language of Section 7106(a) did not create an obstacle to the grievability of claimed violations of Circular A-76 because "[a] grievance

J., dissenting). And respondents' analysis would make grievable by force of law not only matters relating to the exercise of the management rights listed in Section 7106(a)(2), but also complaints involving the exercise of the prerogatives preserved by Section 7106(a)(1)—which include the right to set the mission, budget, organization and internal security practices of an agency. It is difficult to believe that Congress intended such a result to follow from enactment of a statute "one of the major purposes [of which] was to 'preserv[e] the ability of federal managers to maintain "an effective and efficient Government."'" *Nutt*, slip op. 14, quoting *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92, in turn quoting 5 U.S.C. 7101(b).

C. Bargaining Over The Union's Proposal Is Prohibited By 5 U.S.C. 7117(a)(1)

The preceding sections of this brief explain why the Union's proposal impermissibly infringes manage-

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alleging noncompliance with the Circular * * * does not affect management's substantive authority * * *. Rather, it provides a procedure for enforcing the Act's requirement that contracting-out decisions be made in accordance with applicable laws." Pet. App. 14a (footnote omitted). This observation, however, amounts only to a restatement of the court's holding (addressed at pages 23-35, *supra*) that the nature of an agency's compliance with Circular A-76 is not a reserved management right. It should be added that, if this was the court's view, its analysis was circular. In reaching its holding that the Union's proposal was negotiable because it did not infringe on a management right, the court relied in part on its view that alleged noncompliance with Circular A-76 was grievable in any event; in explaining its conclusion that alleged noncompliance with the Circular was grievable, the court relied on its prior conclusion that the nature of an agency's compliance with Circular A-76 is not a reserved management right.

ment rights. The court of appeals' holding, however, also is flawed for an entirely independent reason: it cannot be squared with 5 U.S.C. 7117(a)(1), which provides that the duty to bargain exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation," and does not "extend to matters which are the subject of * * * a Government-wide rule or regulation." Although Circular A-76 ordinarily is not characterized as a rule or regulation (see pages 24-26, 37, *supra*), Congress plainly intended that policy directives would be treated as "rules or regulations" for purposes of Section 7117(a)(1),[23] as the FLRA itself has held. *AFGE, Local 225 and Dep't of the Army*, slip op. 4 (Circular A-76 is a government-wide rule or regula-

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[23] See H.R. Conf. Rep. 95-1717, *supra*, at 158-159; *Legislative History* at 997 (remarks of Rep. Ford). Indeed, OMB has accorded unions consultation rights when it has revised Circular A-76 subsequent to the enactment of Title VII, as is done in the case of "Government-wide rules or regulations" bearing on conditions of employment that are excluded from bargaining by Section 7117(a)(1). 5 U.S.C. 7117(d). See H.R. Conf. Rep. 95-1717, *supra*, at 155. We note that there is no anomaly in Congress's having treated Circular A-76 as if it were a "Government-wide rule or regulation" within the meaning of Section 7117, and not as a "law" or "law, rule, or regulation" within the meaning of other provisions of the Act (see pages 24-26, 37, *supra*): Section 7117 represents a legislative recognition that bargaining under the Act should not interfere with or lead to differential application of government-wide directives, regardless of their nature, while other provisions (such as Section 7103(a)(9)) set forth those areas that Congress believed *should* be subject to third party review. Congress therefore took special pains to explain that policy directives are excepted from negotiation by Section 7117.

tion under Section 7117(a)). See also *National Federation of Federal Employees and Dep't of the Air Force, Lowry Air Force Base*, 9 F.L.R.A. 151, 154 (1982) (Congress intended that the term "Government-wide rule or regulation" used in Section 7117 (a)(1) "not be confined only to those rules or regulations which meet formal requirements for notice or comment"). Negotiation about the Circular therefore is prohibited by Section 7117(a)(1).

1. As noted above (at 6), Circular A-76 establishes its own exclusive, expedited appeals procedure; in addition, it provides that agency contracting-out decisions are not subject to negotiation, arbitration or agreement. These provisions are critical to the contracting-out process established by the Circular. Yet the Union's bargaining proposal, which would bring comparatively elaborate grievance and arbitration procedures to bear on complaints concerning application of the Circular, would render these provisions pointless. The proposal also would exclude from the appeals process affected contractors and their employees, whose participation was deemed essential by the drafters of Circular A-76 for the fair and accurate resolution of contracting-out disputes. On its face, then, the Union proposal is "inconsistent with * * * [a] Government-wide rule or regulation" and may not be the subject of a duty to bargain under Section 7117(a)(1).

The court of appeals disregarded these inconsistencies between the Union proposal and the terms of Circular A-76, and accordingly held the proposal to be a mandatory subject of negotiation, on the ground that "the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regula-

tions" (Pet. App. 16a).[24] But the very purpose of Section 7117(a)(1) is to provide that government-wide rules or regulations *do* limit the scope of rights under the Act. The provision unquestionably "authorizes * * * the issuance of government-wide rules or regulations which may restrict the scope of collective bargaining." H.R. Conf. Rep. 95-1717, *supra*, at 155. Section 7117(a)(1) thus expresses Congress's intent that agencies not be required to bargain about proposals that, if incorporated into the collective bargaining agreement, would be inconsistent with a government-wide directive like Circular A-76.

The other courts of appeals have used similar reasoning in holding that the grievance procedures authorized by Title VII must yield to the exclusive appeal mechanism prescribed by the National Guard Technicians Act of 1968.[25] *State of Nebraska, Mili-*

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[24] The court of appeals evidently meant by this to suggest that claimed violations of Circular A-76 automatically are made grievable by operation of the statutory grievance mechanism, whether or not such claims involve matters that are negotiable. This argument, however, is both incorrect and irrelevant to Section 7117(a)(1). Even if the court were right in its view that alleged violations of the Circular are *grievable* (but see pages 35-42, *supra*), proposals concerning compliance with the Circular still would be rendered *non-negotiable* by Section 7117(a)(1); because this case concerns only negotiability and not grievability, the court of appeals should have reversed the FLRA's negotiability determination and left resolution of the grievability issue for another day. Moreover, because the Circular's expeditious appeals procedure is necessary to make the contracting out process work (see pages 19-20, 35, *supra*), a proposal that would lead to modification of the Circular's appeals mechanism in effect is inconsistent with the Circular's substance.

[25] The National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5), provides that "[n]otwithstanding any other pro-

tary Dep't v. *FLRA*, 705 F.2d 945, 950 & n.8 (8th Cir. 1983); *California National Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *New Jersey Air National Guard* v. *FLRA*, 677 F.2d 276, 283 (3d Cir.), cert. denied, 459 U.S. 988 (1982). See also *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983). These courts have reasoned that union proposals calling for a negotiated grievance procedure in connection with adverse actions affecting National Guard technicians are not negotiable, "since the [Civil Service Reform] Act itself provides that an agency's duty to bargain in good faith exists 'to the extent not inconsistent with any Federal law.'" *California National Guard*, 697 F.2d at 879 (quoting 5 U.S.C. 7117(a)(1)). Because Section 7117(a)(1) treats Circular A-76 as though it were a government-wide rule or regulation that must receive dignity equal to federal law, this principle prohibits bargaining about proposals that are aimed at superseding the exclusive appeals provision in the Circular.

2. Section 7117(a)(1) also bars negotiation over the Union's proposal for a broader reason: the statute flatly declares that the duty to bargain does not extend to "matters which are the subject" of a "Government-wide rule or regulation." See *Legislative History* 927 (remarks of Rep. Udall) (Section 7117(a)(1) "makes Government-wide rules or regulations an absolute bar to negotiations"). Because the nature of the contracting-out process is the subject of a "Government-wide rule"—Circular A-76 (see note 23, *supra*)—it therefore cannot be the subject of bargaining.

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vision of law • • • a right of appeal which may exist with respect to [an adverse action] shall not extend beyond the adjutant general of the jurisdiction concerned."

Respondents have suggested (FLRA Br. in Opp. 17 n.18) that the Union proposal is harmless because it seeks only to incorporate the provisions of Circular A-76 into the contract. But this argument ignores the plain language of the statute: Congress in Section 7117(a)(1) declared that the "subject[s]" of government-wide rules may not be discussed at the bargaining table by individual agencies. It presumably did so in an attempt to forestall the danger that even seemingly innocuous contractual provisions might lead to disparate treatment of government-wide requirements by different agencies—or by different negotiated grievance mechanisms.[26] Congress thus "remove[d] many Government-wide regulations from collective bargaining." *Legislative History* at 933 (remarks of Rep. Clay). See *id.* at 956 (remarks of Rep. Ford). The Union's proposal cannot escape this limitation.

---

[26] In fact, the Union's proposal is innocuous only if claimed violations of Circular A-76 already are subject to the statutory grievance mechanism, as respondents elsewhere assert. If that is true, however, a contractual provision requiring agency compliance with the Circular would be wholly superfluous; keeping the Union's proposal from the bargaining table under Section 7117(a)(1) therefore would in no way affect the interests of Union members. If alleged violations of the Circular are not otherwise grievable, however, permitting negotiation on the Union's proposal (and thus, ultimately, use of arbitral review) would affect contracting out decisions made by the EEOC but not by other agencies, thus distorting the implementation of the government-wide Circular A-76. Either way, there is no reason to strain to read Section 7117(a)(1) to permit bargaining on an issue that undeniably is the "subject" of a government-wide rule or regulation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1985

APPENDIX

5 U.S.C. 7103(a)(9) provides:

> "[G]rievance" means any complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee labor organization, or agency concerning—
>
> > (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> >
> > (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides:

> Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> > (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> >
> > (2) in accordance with applicable laws—
> >
> > > (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

> Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121(a)-(e) provides in part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.
>
> (b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—
>
> (1) be fair and simple,
>
> (2) provide for expeditious processing, and
>
> (3) include procedures that—
>
> * * * * *
>
> (C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may

be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302 (b) (1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices

the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether, for the limited purpose of assuring compliance with applicable laws, rules, and regulations, a dispute over a federal agency's determination to contract out work performed by its employees may be submitted to arbitration under the statutory grievance procedure established by 5 U.S.C. § 7121.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR UNION RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (FLRA) (Pet. App. 40a-48a) is reported at 10 FLRA 3. The FLRA's order denying petitioner's motion for reconsideration is reported at 11 FLRA 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on September 24, 1984. A timely petition for rehearing was denied on December 3, 1984 (Pet. App. 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a

writ of certiorari to and including May 2, 1985. The petition was filed on that date and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case requires consideration of the following statutory provisions, the relevant portions of which are set forth in the appendix to this brief: 5 U.S.C. §§ 7103(a)(9) and (14), 7106, 7117(a), 7121(a)-(c), and 7122(a).

STATEMENT

Overview of Labor-Management Relations in the Federal Service

1. Labor-management relations in the federal service is governed by Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII (the Statute) appears at 5 U.S.C. § 7101 *et seq.* The Statute establishes the Federal Labor Relations Authority (FLRA or Authority) to administer the Statute. Among other responsibilities, the FLRA decides representation questions, unfair labor practice allegations, exceptions to arbitration awards, and negotiability disputes—the latter involving questions concerning the legality of a contract proposal. 5 U.S.C. §§ 7105, 7117. Respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (AFGE or union) is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4). AFGE represents employees of petitioner Equal Employment Opportunity Commission (EEOC or employer), an agency-employer within the meaning of 5 U.S.C. § 7103(a)(3).

2. While establishing a collective bargaining system with enforcement procedures similar in many respects to those prescribed for the private sector under the National Labor Relations Act (NLRA), 29 U.S.C. § 141 *et seq.*, the Statute departs from the private sector model in some respects significant to the instant case.

Unlike the private sector, where grievance arbitration is created solely by contract, the Statute establishes a mandatory grievance arbitration procedure for resolving a wide range of employee and labor union complaints, 5 U.S.C. § 7121, excluding some categories of disputes not encompassing the contracting out questions at issue in this case. 5 U.S.C. § 7121(c). "Grievance" is defined as any complaint by any employee or labor organization relating to "the employment of any employee" or any complaint by an employee, labor organization, or employer concerning the effect, interpretation, or alleged breach of a collective bargaining agreement; or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). "Conditions of employment" are broadly defined to include matters, "whether established by rule, regulation, or otherwise, affecting working conditions," excluding those matters relating to proscribed political activities, the classification of positions, or to the extent they are specifically provided for by federal statute. 5 U.S.C. § 7103(a)(14). The statutory grievance procedure requires arbitration as a final step, 5 U.S.C. § 7121(b)(C), and provides for review by the FLRA of any exceptions to arbitral awards. 5 U.S.C. § 7122. The FLRA is required to assure that no award is deficient "because it is contrary to any law, rule, or regulation" or on other grounds similar to those applied by federal courts [under 29 U.S.C. § 185] in private sector labor-management relations." 5 U.S.C. § 7122(a).

Furthermore, unlike the NLRA, the Statute establishes a *limited* statutory reservation for some management prerogatives relating to the employer's mission, budget, organization, and internal security, 5 U.S.C. § 7106(a)(1), as well as its authority "in accordance with law" to hire, lay off, appoint, or discipline employees, assign work, and make contracting out determinations. 5 U.S.C. § 7106(a)(2). In the private sector, "management rights" are largely created by contract. In addition to the limitation imposed by section 7106(a)(2) ("in accordance with

law") management's authority is expressly qualified by the obligation to negotiate over procedures and appropriate arrangements relating to any management prerogative. 5 U.S.C. § 7106(b)(2) and (3).

In situations where an employer alleges that a proposal is contrary to law, the dispute, unlike private sector practice, may be submitted to the FLRA under an appeal procedure separate from the unfair labor practice route. 5 U.S.C. § 7117. This route was utilized in this case, following the employer's assertion that the union's proposal was contrary to law by virtue of its purported conflict with management's reserved authority to make contracting out determinations (Pet. App. 40a).

Overview of Contracting Out Process

Commercial and industrial activities performed by federal employees that do not involve inherently governmental functions may be performed by contract with private companies if shown to be cost effective and otherwise meeting prescribed requirements. These requirements are variously established by statute and regulation and restrict individual agencies in making contracting out determinations.

OMB Circular A-76 is a comprehensive document establishing executive branch policies and procedures to be used in determining whether commercial or industrial goods and services should be obtained by contract with private companies or provided in-house, using government personnel and facilities.[1] In large part, it establishes

[1] For brevity, all references will be to the last comprehensive revision of the Circular in 1983, 48 Fed. Reg. 37110 *et seq.* While the Circular that was in effect when the dispute over the union's proposal first arose was issued in 1979, 44 Fed. Reg. 20556, the proposal does not prevent the employer from applying the Circular and other laws pertaining to contracting out as they have changed, or would change, from time to time. *See* FLRA's decision (Pet. App. 41a). Furthermore, the differences between the two versions of the Circular are not material to the disposition of the issue presented on review.

vigorous cost competition between the private and public sectors, mandating that the services will be provided by the means which is less expensive. Circular A-76, ¶ 5a, 48 Fed. Reg. 37114. *See also* Comptroller General, *Factors Influencing DOD Decisions to Convert Activities from In-House to Contractor Performance, Report to the Chairmen, Senate and House Committees on Armed Services* (1981) 4.

The Federal Acquisition Regulations, which establish general procurement rules for federal agencies,[2] including those pertaining to the acquisition of commercial or industrial products, summarize the requirements of the Circular, highlighting the rules that, "[i]n making cost comparisons, agencies shall—

> (1) Prepare an estimate of the cost of Government performance based on the same work statement and level of performance as apply to offerors; and
>
> (2) Compare the total cost of Government performance to the total cost of contracting with the potentially successful offeror;
>
> (b) Provide that solicitations . . . issued to obtain offers for comparison purposes shall state that they will not result in a contract if Government performance is determined to be more advantageous . . . ;
>
> (c) Provide that each cost comparison shall be reviewed by an activity independent of the activity which prepared the cost analysis to ensure conformance with the instructions in the [Cost Comparison] Handbook[.] . . . .

48 CFR § 7.302 (1984).

First established as a formal document in 1955, the Circular has been amended several times, as noted in petitioner's brief, at 5, n. 3. The Circular and its accompanying supplement, which includes a comprehensive cost comparison handbook, "set[] forth procedures for determining whether commercial activities should be performed

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[2] 48 CFR § 1.000 (1984).

under contract . . . or in-house." Circular A-76, ¶ 1, 48 Fed. Reg. 37114. By its terms, each agency head is required to implement the Circular and its supplement. *Id.*, ¶ 9(d), 48 Fed. Reg. 37115. The Circular establishes "cost competition" between contract and in-house performance over most agency functions and mandates that "comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work." *Id.*, ¶ 5a, 48 Fed. Reg. 37114. It further provides that "the Government shall not start or carry on any activity . . . if the product or service can be produced economically from a commercial source." *Id.*, ¶ 5c, 48 Fed. Reg. 37114.

In addition to the limitations that the Circular imposes upon agency discretion, agencies are restricted by their own regulations [3] pertaining to contracting out and statutory restrictions which Congress has enacted in this area. For example, in 1974, Congress established a requirement that the Department of Defense provide it with a full justification for any conversion from one form of manpower (military, civilian, or private contract) to another.

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[3] As required by Circular A-76, individual agencies are required to implement the Circular's provisions through their own instructions. Circular A-76, ¶ 9, 48 Fed. Reg. 37115. *See e.g.*, 50 Fed. Reg. 37527 (Department of Defense final rule on commercial activities program); DOD 4100.33-H (DOD In-House vs. Contract Commercial and Industrial Activities Cost Comparison Handbook (Apr. 1980) (intended to establish consistency, assure that all substantive factors are considered and achieve desirable level of uniformity—mandatory for use by all DOD activities); Army Regulation 5-20 (eff. Feb. 1, 1985) (implements Circular A-76 and DOD directives and provides standards for determining coverage of activities, establishes procedures for review of activities, and provides instructions for studies to compare the cost of contract versus in-house performance); OPNAVINST 4860.6C (Naval Commercial Activities (CA) Program Manual) (eff. Feb. 5, 1982); Air Force Regulation 26-1 (Manpower Policies and Procedures, Comparative Cost Analysis) (eff. Oct. 1981); Department of Transportation Order 4400.2C (Performance of Commercial Activities) (eff. Feb. 1984); and Department of Transportation Order, FAA 2510.12B (Performance of Commercial Activities—OMB Circular A-76) (eff. June 1984).

Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365, § 502, 88 Stat. 399 (1974).[4] In 1980, Congress passed legislation prohibiting contracting out by the Department of Defense, if intended to circumvent any personnel ceiling, and requiring the submission of reports to Congress on all proposals to contract out work, including certification that a cost comparison has demonstrated that the performance of the work by contract would result in a cost savings to the government when compared with in-house performance organized in the most efficient and cost effective manner. Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, § 502, 94 Stat. 1077, 1086 (1980).

Moreover, in recent years Congress has sought to prohibit contracting out in entire agencies and occupational areas. The Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 307, 98 Stat. 2492, 2514 (1984) prohibited contracting out of core logistics services (personnel, equipment, and facilities) under "Circular A-76 or any successor administrative regulation or policy." The Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747 (1982) prohibited contracting out of any firefighting or security guard functions at any military installation except for the renewal of existing contracts.[5] Further, the Veterans' Compensation, Education, and Employment Amendments Act, 1982, Pub. L. No. 97-306, § 409, 96 Stat. 1429, 1446 (1982), 38 U.S.C. § 5010 note, establishes detailed restrictions upon contracting out by the Veterans Administration. In addition to imposing an out-

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[4] See also Department of Defense Authorization Act, 1980, Pub.L. No. 96-107, § 501(e), 93 Stat. 803, 809 (1979) (restrictions on manpower management affecting some activities subject to contracting out).

[5] This Act, at § 305, 96 Stat. 724, also imposed a broad moratorium upon any contracting out studies involving functions performed by the Department's civilian personnel. This operated to effectively curtail contracting out by the Department of Defense during the period covered by the Act.

right ban on any contracts involved with direct patient care, it imposes requirements beyond those prescribed by Circular A-76, among them that health care would be enhanced by contracting out, and that the costs of performance over the first five years of a contract would exceed 15 percent savings over in-house performance. *Id.*

Facts and Proceedings Below

During negotiations with AFGE, the EEOC refused to bargain over the union's proposals relating to the employer's responsibilities with regard to contracting out work performed by bargaining unit employees (Pet. App. 40a-47a). Specifically, the employer refused to bargain over the following proposals:

Union Proposal I

> Section I—The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

Union Proposal II

> Section II—The EMPLOYER shall notify the council and appropriate Local President(s) of its intention to solicit bids for contract work which could result in a reduction-in-force or transfer or abolition of function affecting employees in the unit. Such advance notice shall provide a full explanation of the reasons for such actions and provide the UNION sufficient opportunity to respond in writing.

Union Proposal III

> Section III—The parties shall negotiate the [e]ffect of any contracting-out decision which could alter the conditions of employment in the bargaining unit prior to implementing the decision to contract-out. The EMPLOYER agrees to eliminate or minimize any potential adverse [e]ffect through reassignment or training and to take whatever other action may be necessary to protect bargaining unit employees.

(Pet. App. 40a, 43a, 45a, 46a).

AFGE, pursuant to 5 U.S.C. § 7117, appealed the employer's refusal to bargain over these proposals to the FLRA. The FLRA declared the first two proposals negotiable, ordering the employer to bargain with the union over them; the FLRA declared the third proposal nonnegotiable as outside the statutory duty to bargain.[6]

With regard to the first proposal, which is the focus of the employer's petition, the FLRA found that it was not inconsistent with management's right to "make determinations with respect to contracting out" under section 7106(a)(2) (Pet. App. 40a). The FLRA held that a contractual agreement whereby the employer agreed to comply with OMB Circular A-76 and other applicable laws and regulations relating to contracting out would not impose any substantive limitations upon management's right to make contracting out determinations apart from those already existing (Pet. App. 41a).

The FLRA also rejected the employer's contention that its right to make contracting out determinations would be impeded because the proposal would subject its contracting out actions to resolution by the parties' grievance procedure (Pet. App. 42a). In this regard, the FLRA recognized that questions concerning the employer's contracting out actions, even in the absence of the contract provision proposed by the union, were grievable unless the parties, through negotiations, agreed to exclude such grievances, or a particular grievance was inconsistent with law (Pet. App. 42a-43a).

The FLRA also rejected the employer's argument that a union's complaints over a contracting out decision would be solely reviewable under the appeal procedure established by Circular A-76 (Pet. App. 41a-42a), whereby the employer reviews its own actions. The FLRA held

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[6] The FLRA reasoned that this proposal created absolute employment security for employees affected by a decision to contract out unit work, thereby directly interfering with the employer's right under section 7106(a)(2)(A) to layoff employees (Pet. App. 46a-47a).

that even if there was a conflict between the proposal and the Circular, the latter cannot "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (Pet. App. 42a). [Emphasis in original].

With regard to the second proposal, requiring the employer to provide the union with advance notice and opportunity to respond to the employer's reasons for considering contracting out of work performed by unit employees, the FLRA rejected the employer's argument that the proposal would impermissibly interfere with its right to make contracting out determinations (Pet. App. 44a). In so doing, it also found that there was no inconsistency between the proposal and federal procurement regulations calling for "economy, efficiency and effectiveness in the procurement of property and services" (Pet. App. 45a).

The EEOC sought reconsideration of the FLRA's decision (*see* Pet. App. 6a, n.9), requesting, in part, that the FLRA "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute." 11 FLRA 720. The FLRA denied the request, finding that the employer was asking the FLRA, in effect, to make arbitrability determinations in the absence of a specific factual context. *Id.*, 721. The FLRA continued by advising the employer that it could avail itself of the statutory procedure under 5 U.S.C. § 7121 for resolving arbitrability questions.[7]

The employer sought judicial review under 5 U.S.C. § 7123(a) of the FLRA's decision insofar as it required negotiations over the proposal whereby the employer would agree to conform its contracting out actions to

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[7] Under the scheme crafted by Congress, questions of arbitrability are to be resolved, in the first instance, by arbitrators. 5 U.S.C. § 7121(a)(1). The arbitrator's ruling on the arbitrability question is reviewable by the FLRA upon exceptions filed by a party. 5 U.S.C. § 7122(a). *See* Celmer, *Substantive Arbitrability*, 81 Federal Labor Relations Reporter No. 17 (Oct. 1981).

Circular A-76 and other applicable law and regulation (Pet. App. 1a, 6a). The FLRA filed a cross-petition for enforcement (Pet. App. 6a).

A divided panel of the court of appeals enforced the FLRA's order (Pet. App. 1a-37a), holding that the proposal would not interfere with the employer's prerogative to make contracting out determinations. In reaching this conclusion, the court of appeals agreed with the FLRA's finding, in effect, that the language of the proposal merely echoed the statutory requirement that contracting out determinations, like other reserved management prerogatives affecting conditions of employment, are grievable to the extent questions exist as to their conformance with law, rule, or regulation (Pet. App. 9a). In this regard, the court observed that the proposal imposed no substantive criteria upon management's reserved authority to make contracting out determinations. (Pet. App. 9a). The court continued by observing that both section 7106(a)(2)(B), which preserves management's authority to make contracting out determinations, and section 7103(a)(9) which, along with section 7121, define the scope and coverage of grievance procedures in the federal sector, evidence that even so-called management rights are "qualified" to the extent that an employer's actions must conform to law (Pet. App. 11a-15a).

The court also held, in agreement with the FLRA, that there was no inconsistency between the proposal and the provision in Circular A-76 providing for internal agency review of complaints over a contracting out determination (Pet. App. 16a). The court reasoned that the Circular did not operate to "create" a right of appeal; the right to arbitral review was created by Congress in enacting the statutory grievance procedure (Pet. App. 16a). Furthermore, the court added, that even if there was an actual or apparent inconsistency, Congress did not intend to allow agencies, by regulation, to restrict coverage of the grievance procedure (Pet. App. 16a).

The dissenting panel member would have denied enforcement of the FLRA's order, stating that the union's

proposal would interfere with the employer's prerogative to make contracting out determinations by imposing substantive criteria upon management's decisionmaking authority (Pet. App. 24a). In support of this conclusion, the dissent read the second clause of section 7106(a) ("nothing in this chapter shall affect the authority of any management official . . .") as limiting the coverage of the statutory grievance procedure (Pet. App. 28a-29a). The dissent also found that even if a contracting out decision results in the loss of jobs, it does not affect "conditions of employment" within the meaning of section 7106(b), which the dissent views as much less inclusive than its analog in the private sector (Pet. App. 29a-33a).

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the union's contract proposal that the EEOC "comply with OMB Circular A-76, and other laws and regulations concerning contracting out" merely echoed the statutory requirement that the parties' grievance procedure encompass any complaint by an employee or the union alleging that the employer's actions were contrary to law, rule, or regulation (Pet. App. 9a, 15a).

In taking its contrary position, the employer ignores the plain language used by Congress (and the purposes underlying its enactment of the Statute) in establishing a broad grievance procedure in the federal sector. Unique to the federal sector, Congress defined a "grievance" to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). The Statute also provides that the grievance procedure "shall be the exclusive procedure [] for resolving such claims." 5 U.S.C. § 7121(a)(1). Although Congress excluded from the statutory grievance procedure certain disputes, *see* 5 U.S.C. §§ 7103(a)(9), (a)(14), and 7121(c), none of the exclusions encompass contracting out disputes.

The employer largely ignores the broad statutorily prescribed scope of the grievance procedure to instead focus upon the union's motives in seeking to include the proposal within the parties' agreement and to assert that section 7106, the management rights provision in the Statute, operates to bar arbitral review of contracting out disputes.

With regard to the union's proposal, the employer ignores the practicalities of collective bargaining in the federal sector. Although, in contrast to the private sector, there is a vast expanse of federal law setting the terms and conditions of employment for federal employees, it is common practice for such agreements to include extensive recitation of rights established by statute or otherwise if for no other reason than the agreement provides a handy reference guide and serves to underscore the parties' intention to comply, in the best of good faith, with regard to some particularly significant legal obligations. Thus, there is no merit to the employer's contention that the union's efforts to include the proposal in the parties' agreement evidences an attempt to obtain something not provided by the Statute's own terms.

Similarly, the employer is incorrect when it suggests that section 7106 operates to bar arbitral review of contracting out of disputes. Not only does the hierarchical scheme of section 7106 subordinate reserved managerial authority to the duty to bargain over procedures involving its exercise and the protection of employees adversely affected, but its terms substantively qualify the exercise of contracting out authority and other employer prerogatives "in accordance with law." 5 U.S.C. § 7106(a)(2).

The EEOC's core argument that "nothing in [the Statute] shall affect management's authority to make contracting out determinations," by logical extension, would bar grievances and arbitral review over the exercise of managerial authority, among others, to hire, assign, lay off, retain, discipline and appoint employees, and

to assign work. In drafting section 7106, Congress treated identically the exercise of these rights, 5 U.S.C. § 7106(a)(2)(A)-(D), qualifying the exercise of each by the proviso that it be done "in accordance with law." 5 U.S.C. § 7106(a)(2). The employer's position would not only fail to square with the language of section 7106, but would also render superfluous sections 7103(a)(9) and 7121(c) to the extent that they exclude certain matters from the grievance procedure.

The reading which the court of appeals gave to the statutory grievance procedure and its relationship to section 7106(a)(2) is fully supported by the legislative history of the Statute. Indeed, the legislative record shows that Congress was aware of the danger that some employers might seize upon section 7106 as a means to defeat their obligations under the Statute. To prevent this occurrence, Congress left unmistakeable direction that the FLRA and the courts should reject any such attempt.

As noted earlier, contracting out by federal agencies is governed by rules and regulations and, to a lesser extent, for some agencies by statute. While the focus of this case has been upon Circular A-76, the Federal Acquisition Regulations, 48 CFR § 1.000 *et seq.*, and the regulations of individual agencies also govern the employers' actions. Although Circular A-76 is not a formal regulation, it is promulgated in a manner which parallels notice and comment rulemaking under the Administrative Procedure Act. It creates specific, binding requirements upon federal employers, leaving individual agencies little discretion. The Comptroller General routinely applies its provisions in resolving challenges to agency procurement actions. Moreover, the Statute clearly contemplates that arbitral review and other aspects of collective bargaining extend to issuances such as the Circular, which govern a federal employer's actions. While the employer argues, albeit erroneously for the reasons just discussed, that the Circular is not a rule for purposes of arbitral review,

it argues that it is a rule or regulation under 5 U.S.C. § 7117, which operates, in some cases, to bar negotiation over matters covered by governmentwide rules or regulations. We contend that the Circular is a "rule" for all purposes within the meaning of the Statute and that it is not barred by section 7117. Contrary to the EEOC, the proposal is not barred because it involves the same subject matter as the Circular or conflicts with its "exclusive appeals procedure." The employer's position, if correct, would completely nullify the duty to bargain in the federal sector, and, as noted by the court of appeals, would allow an agency to undo by regulation what Congress has expressly mandated by statute, *i.e.*, to provide for arbitral review over an agency's application of law, rule, or regulation.

Arbitral review is fully consistent with the dual nature it serves in the federal sector to enforce both contractual rights and "to police compliance with controlling laws, rules, and regulations." Elkouri and Elkouri, *How Arbitration Works* 52-53. This reflects the reality of federal employment where there exists "an immense body of law which governs nearly every aspect of the employment relationship." Frazier, *FLRA Policy and Practice in Arbitration Appeals: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981). Thus, "[w]hile there may be a common law of the shop . . . in the private sector, there is a statutory law of the workplace in the federal sector." *Id.*

It is only because the issue in this case arose in the context of a negotiability dispute that the employer can raise the spectre of an arbitrator substituting his or her judgment in matters reserved to the employer's discretion. In the unlikely event that an arbitrator might overstep the bounds of his or her authority, review of the award by the FLRA is available under 5 U.S.C. § 7122. Whatever additional assurances, the employer needs to supplement its reserved authority, in light of arbitral review, can be obtained at the bargaining table.

Finally, arbitral review, by assuring compliance with applicable law, rule, or regulation, can only promote an "effective and efficient" government, a goal sought to be achieved by Congress in enacting the Statute. 5 U.S.C. § 7101.

ARGUMENT

Disputes over an agency's contracting out determinations are subject to arbitral review for the limited purpose of assuring compliance with applicable laws, rules, or regulations under the statutory grievance procedure established by section 7121 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*

A. Introduction.

The EEOC's argument can be reduced to the following proposition: the contractual provision at issue in this case is not negotiable because it would subject the employer's decision to contract out to the arbitration process. As we demonstrate below, however, the Statute clearly requires submission of such disputes to arbitral review for the *limited purpose* of assuring compliance with law, rule, and regulation. The union does not claim that its contract proposal would permit any substantive negotiations over such issues as whether, when, or how management can decide to contract out for services, or that the Statute's grievance arbitration mechanism would permit an arbitrator to decide such issues. Similarly, the union does not claim that it can engage in negotiations concerning the criteria which the employer must apply in making such determinations, or that an arbitrator can impose any criteria not already prescribed by law. Instead, the union claims the right to include in the parties' collective bargaining agreement a clear restatement of its rights under 5 U.S.C. §§ 7103(a)(9) and 7121 to arbitral review as a means to assure that the employer has followed the government's own laws, rules, and regulations governing the contracting out process.

This issue can be better understood against the backdrop of how the labor relations system in the federal

sector operates. Accordingly, we begin by briefly describing that system and how it differs from the more familiar private sector system.

One hallmark of the labor relations system in the private sector is the sharp dichotomy the law draws between contractual and statutory rights. In the main, the terms and conditions of employment for private sector employees are created by agreement of the parties and are enforced through a grievance arbitration procedure designed to "effectuate the intent of the parties." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). Federal law regulates the substance of private sector employment relationships only interstitially, and, to the extent such federal rights are created by statute, an independent federal (judicial) remedy exists to enforce those rights. In the private sector, even where a contractual right duplicates a statutory right—as might be true, for example, where a contract proscribes racial discrimination—the two rights remain distinct and are enforced through different forums; indeed, a decision with respect to a contractual claim is not even preclusive of a parallel statutory claim.

As more fully explored in part E of our argument, at 41-48 herein, there is no such sharp dichotomy between contractual and statutory rights in the federal sector. To begin with, for federal employees, a large number of employment rights are statutory in nature. As a member of the Federal Labor Relations Authority has observed, there is an "immense body of law which governs nearly every aspect of the employment relationship between federal employees and their employer the Federal Government." Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981). Thus, "[w]hile there may be a common law of the shop in many industries in the private sector, there is a statutory law of the workplace in the federal sector." *Id.*

Moreover, unlike their private sector counterparts who enforce only contractual rights, federal sector arbitrators enforce rights created by law as well; indeed, a principal function of the federal arbitrator is to "police compliance with controlling laws, rules, and regulations by federal agency employers." Elkouri and Elkouri, *How Arbitration Works* (4th ed. 1985) 52-53. This remains true without regard to whether or not that right is incorporated into a collective agreement (and thereby made into a contractual obligation as well); the Statute expressly provides that, unless the parties to a collective agreement otherwise agree, the grievance procedure shall adjudicate "*any* claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Indeed, the Statute provides that the grievance procedure "shall be the exclusive procedure[]" for resolving such claims. 5 U.S.C. § 7121(a)(1).

Given the vast expanse of federal law setting the terms and conditions of employment for federal employees—and given that, by operation of law, the statutory rights of federal employees are enforceable through the grievance procedure—in theory all that need be included in a bargaining agreement in the federal sector are the particulars of a grievance procedure and provisions establishing those terms and conditions of employment that are not fixed by federal law. In practice, however, federal sector agreements are not so limited. It is common practice for such agreements to include extensive recitations of statutory rights. Although such statements have no independent legal effect—the rights exist and would be enforceable through the grievance procedure even if not mentioned in the collective agreement—federal agencies and unions often find it useful to delineate some or all of the statutory rights in the agreement, if only to provide a handy reference guide for managers and employees alike and to serve as a token of the parties' joint agreement that the employer will comply with certain

particularly important legal obligations in the best of good faith.

In the union's view, that was precisely the point of its proposal for a contractual provision committing the agency to "comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out." The union proceeded on the premise that the Circular—like the "other applicable laws and regulations" referenced in the proposal—is part of the "statutory law of the workplace in the federal sector" which is binding on the EEOC, and enforceable through the grievance procedure, whether or not mentioned in the collective agreement. The union, nonetheless, thought it useful to include the reference in the parties' agreement. When the EEOC challenged the negotiability of the proposal, it put in question both the union's understanding of the Statute and the Circular's legal status, precipitating the instant controversy.

B. The statutory grievance procedure extends to alleged violations of laws, rules, or regulations governing contracting out, notwithstanding the reservation of managerial authority in section 7106(a)(2).

1. In taking issue with the finding that some disputes relating to contracting out are subject to arbitration under the parties' statutorily prescribed grievance procedure, the employer ignores the plain language used by Congress (and the purposes underlying its enactment of the Statute) in establishing a broad grievance procedure in the federal sector. Unique to the federal sector, Congress defines a "grievance" as follows:

> [A]ny complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—

> (i) the effect or interpretation of a claim of breach of a collective bargaining agreement; or
>
> (ii) *any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation* affecting conditions of employment[.] [Emphasis added.]

5 U.S.C. § 7103(a)(9). The Statute provides that the reach of "grievance" is limited only by the matters specifically excluded from the definition of "conditions of employment," 5 U.S.C. § 7103(a)(14), and those matters excluded by 5 U.S.C. § 7121. The term "conditions of employment," in turn, is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise affecting working conditions" except for: "policies, practices, and matters" concerning prohibited political activities, classification of positions, and those specifically provided for by federal statute. 5 U.S.C. § 7103(a)(14). Section 7121 excludes only the following matters from the statutory grievance procedure: alleged violations of proscriptions on political activity; disputes relating to retirement, life insurance, and health insurance questions; suspension or removal of employees on grounds of national security; examination for, or certification or appointment to, positions; or reduction in rank. 5 U.S.C. § 7121(c). Thus, none of the matters expressly excluded from the grievance mechanism prescribed for the federal sector relate to the issue presented by this case.

Upon the strength of the statutory language, the court of appeals necessarily concluded that "[a]n allegation that the EEOC failed to comply with the OMB Circular, or with any other law or rule governing contracting out, plainly falls within [the Statute's] expansive definition" (Pet. App. 12a-13a). In this regard, the court suggests that if Congress had intended to exclude disputes over the contracting out process from the statutory grievance procedure, it logically would have utilized section 7121

(c), wherein it chose to list the categories excluded from the procedure (Pet. App. 12a). Except for those subject areas, Congress provided for arbitral review over all categories of disputes arising in the federal workplace. It is by specific statutory language, 5 U.S.C. §§ 7103(a), 7121, that Congress sought to establish the parameters of the grievance mechanism, not indirectly through language in section 7106(a).

As the court of appeals recognized, the union's proposal would merely echo the statutory requirement that, absent contrary agreement by the parties, the grievance mechanism would encompass any complaint by an employee or the union that an employer had contravened a law, rule, or regulation (Pet. App. 9a, 15a). The result reached by the court and the FLRA is a natural construction of the statutory provisions; it stands in marked contrast to the EEOC's strained construction which, as discussed below, would dismiss, as meaningless, the limiting language "in accordance with law" from section 7106(a)(2). The EEOC seeks to restrict the issue in this case to disputes solely arising in connection with Circular A-76, demonstrating a misapprehension of the Circular and ignoring the other statutory and regulatory restrictions upon management authority in the contracting out area.[8] Then, by trying to create the misimpression that Congress drafted the management rights provision with the intention of curtailing the submission of contracting out disputes to arbitral review, the EEOC asks the court, in effect, to rewrite the Statute to exclude its provision for limited review of contracting out determinations and to incorporate its own policy regarding the wisdom of arbitral review over such disputes.

2. The employer largely ignores the *statutorily* prescribed scope of the grievance procedure to focus, instead, on the management rights provision, 5 U.S.C. § 7106. That provision, the EEOC argues, prevents submission of

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[8] See discussion at 33-41 herein.

contracting out disputes to the grievance arbitration procedure. This argument must fall in the face of the clear language of the Statute.

The employer's position not only denies any meaning to the qualification that management is to make contracting out determinations "in accordance with law," 5 U.S.C. § 7106(a)(2), it also ignores the other equally clear limitations imposed by section 7106. In writing section 7106, Congress established a hierarchical scheme in limiting negotiations over reserved management authority. First, it assured that the management rights provision not be used to bar negotiations over any matters relating to procedures for exercising any reserved authority, 5 U.S.C. § 7106(b)(2), or "appropriate arrangements" for employees adversely affected by the exercise of such authority. 5 U.S.C. § 7106(b)(3). Section 7106 predicates any exercise of management's reserved authority upon negotiations with the union over the way in which the authority will be exercised and the protection of employees who may be adversely affected. Accordingly, any contracting out disputes which involve matters of "procedure" or "appropriate arrangements" are arbitrable.

While all reserved authority, therefore, is subordinated to the bargaining obligation over procedure and appropriate arrangements, *cf. Cornelius v. Nutt*, 105 S.Ct. 2882, 2885 (1985), Congress differentiated from among management's prerogatives in protecting against their otherwise possible diminishment through collective bargaining. Congress imposed no substantive qualification within section 7106 upon the reservation of an agency's authority over its "mission, budget, organization, number of employees, and internal security practices." 5 U.S.C. § 7106(a)(1). With regard to all other enumerated aspects of reserved managerial authority, including contracting out, the employer's prerogatives are substantively qualified by the proviso that they be exercised "in accordance with law." 5 U.S.C. § 7106(a)(2). Although the employer stops short of stating in its brief that the section 7106(a)(2) proviso was not intended by Congress to

limit management's authority,[9] its position nevertheless would deny that language any effect insofar as contracting out determinations are concerned.

The EEOC's argument that contracting out determinations are not subject to arbitral review, by logical extension, would totally exclude from that process challenges to the exercise of any authority listed in section 7106(a)(2)(A)-(D). This is the effect of its core argument that "nothing in this chapter shall affect . . . management's authority to make contracting out determinations" because the language upon which it relies also reserves management's authority "in accordance with law":

> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take any other disciplinary action; [or]
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.
>
> (C) with respect to filling positions, to make selections for appointments from—
>
> > (i) among properly ranked and certified candidates for promotion;
> >
> > (ii) any other appropriate source; and
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

5 U.S.C. § 7106(a)(2). In seeking to preserve management authority in the contracting out area, Congress, by placing it in section 7106(a)(2) rather than section 7106(a)(1), clearly chose to do so in the same manner as it did for managerial rights, among others, to hire, assign, lay off, retain, discipline, and appoint employees, and to assign work. 5 U.S.C. § 7106(a)(2).

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[9] But note that in its petition for certiorari, the employer suggests that the proviso "in accordance with applicable law" was not intended as a substantive limitation upon management's reserved authority (Pet. 15-16).

In secton 7121, Congress expressly provides that parties may avail themselves of the grievance arbitration procedure for disputes involving prohibited personnel practices, employment discrimination, adverse actions, and unacceptable performance, 5 U.S.C. § 7121(d) and (e), *i.e.*, the whole range of personnel actions from discharges or demotions based upon poor performance or misconduct to discrimination issues. *See* 5 U.S.C. §§ 2301, 2302, 4303, 7512. Even the employer would find it difficult to deny that those matters provide the grist for the mill of arbitration. Yet, the "nothing shall affect" language in section 7106(a), as read by the employer, would supersede the provisions of section 7121 and deny arbitral review over disputes relating to these matters.

Similarly, the language of section 7121(c), which excludes categories of disputes from the grievance procedure, would be rendered superfluous under the EEOC's analysis. For example, under its argument *any* grievance concerning an "appointment" would be barred from the grievance procedure by operation of § 7106(a)(2)(C), which reserves management's prerogative "to make selections for appointments." Surely, Congress would not have included language in section 7121(c) specifically excluding from the grievance procedure "any grievance . . . concerning any . . . appointment," if, as the employer suggests, section 7106(a)(2) was intended itself to exclude from the grievance mechanism any disputes relating to the employer's appointment authority. Thus, it is clear that the mere listing of a managerial prerogative in section 7106 does not operate to remove disputes relating to its exercise from the statutory grievance procedure. Nonetheless, the employer, to the extent it might seek to avoid the logical consequence of its position, would have the court, contrary to norms of statutory construction, somehow pare contracting out from the other prerogatives listed in section 7106(a)(2), and treat it differently than other managerial rights. The language of section 7106 simply does not permit such a torturous construction; instead it mandates that contracting out, as part of section

7106(a)(2)(B), is to be treated the same as the other prerogatives listed in subsections (A)-(D)—prerogatives which are routinely submitted to arbitration or the Merit Systems Protection Board for a determination whether an employer has acted in accordance with law. *See* 5 U.S.C. §§ 7121(e), 7701(c)(2)(C). As the FLRA and the court of appeals recognized, effect can be given to the "in accordance with law proviso" of section 7106 and the broad grievance procedure, as established by section 7103 and 7121, only by treating complaints over contracting out determinations the same as complaints regarding discipline, layoffs, and work assignments. Logically extended, the employer's position would deny any effect to the "in accordance with law" proviso in section 7106(a)(2) not only in the contracting out area but also, contrary to uniform practice and policy, with regard to a whole host of other employment actions, where the rights of federal employees also are established by a myriad of laws, rules, and regulations. *Cf. Cornelius v. Nutt*, 105 S.Ct. 2882, 2883 (1985).

Allowing arbitral review to assure employer compliance with law, rule, or regulation, both gives effect to the Statute's provisions establishing the grievance mechanism and preserves management's ultimate authority to act consistent with law, excepting from arbitral review only those matters excluded from its coverage by section 7103 and 7121(c). This interpretation of the Statute, rather than infringing upon management's authority under section 7106(a), only assures the employer's compliance with the law applicable to its contracting out determinations. A contrary reading would only permit the government to violate with impunity its own contracting out rules, a result which clearly is not in the interest of the employer, federal employees, or the public.

3. The employer contends (Pet. Br. 45) that submission of contracting out disputes is barred by 5 U.S.C. § 7117(a)(1), which excepts from the bargaining obligation certain matters covered by government rule or reg-

ulation. Since the Circular concerns contracting out, the employer argues, no proposal relating to contracting out can be negotiated. The argument is two pronged, neither of which has merit.

First, the EEOC asserts that the union's proposal is "inconsistent" with the Circular because it conflicts with the latter's exclusive appeals procedure (Pet. Br. 44). However, as the FLRA and court of appeals held, even if there is some inconsistency with a provision in the Circular, that provision cannot override the statutory requirement that a grievance procedure be available to resolve complaints over "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." *See* 5 U.S.C. § 7103(a)(9).[10]

As the court of appeals correctly observed:

> First, the proposal is not inconsistent with the Circular's limiting language. The proposal does not "create" any new right of appeal. Rather, . . . the right to file grievances regarding contracting-out decisions is created by the [Statute].
>
> Second, and more important, the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations. There is no indication . . . of a congressional intent to allow agencies to limit by regulation the statutorily defined

[10] The EEOC's reliance upon decisions relating to the grievability of issues involving national guard technicians (Pet. Br. 45-46) is misplaced. In the cases cited, it was a statutory conflict, not an alleged inconsistency between the statutory grievance procedure and applicable regulation, which was controlling. While there, the courts viewed the specific statute involved, the National Guard Technicians Act, 32 U.S.C. § 709, as more indicative of Congressional intent with regard to appeals by technicians than the more general right to grieve under the Statute, the cases provide no support for the contention that a rule or regulation can operate to restrict the right to grieve.

grievance procedure. To allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co. v. NLRB*, 338 U.S. 355, 363 (1949).

The second prong of the employer's argument is that the union's proposal is barred because it involves the same subject matter as covered by the Circular. Here again, the employer seeks to either treat contracting out differently from other matters relating to federal employment *or* to eliminate collective bargaining altogether over subjects that historically and without any prior question have been negotiated in the federal sector. Governmentwide regulations, most typically those issued by the Office of Personal Management, cover virtually the entire spectrum of the employment relationship in the federal sector. *See generally* Code of Federal Regulations, Title 5, and the *Federal Personnel Manual*. If the employer's argument is correct, then virtually nothing affecting the federal workforce can be negotiated because any provision would involve a matter which already is the "subject" of a governmentwide rule or regulation. As this would render the duty to bargaining provisions in the Statute a nullity, the employer's argument must fail. Neither section 7106(a)(2) nor section 7117(a)(1) contains any language which would allow for the special treatment which the employer's position demands.

4. The employer attempts to draw upon experience in federal sector labor-management relations, prior to enactment of the Statute, to support its argument that Congress did not intend the submission of contracting out disputes to arbitration. Its attempt must fail.

Arbitration was not always favored under the management-oriented regime that existed prior to enactment of the Statute.[11] In contrast to the system established

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[11] *See* Federal Labor Relations Council, *Report and Recommendations of the Federal Labor Relations Council on the Amendment of*

under the Statute, substantial restrictions existed upon arbitration's use and coverage.[12] For a period of time, it was advisory in nature, serving only as an adjunct to an agency's final determination on complaints by unions and employees.[13] Even when it became binding upon the parties, its scope did not extend to more significant actions by the employer, those covered by so-called "statutory appeals." [14] Adverse actions and other matters for which a "statutory appeal" existed were excluded from the parties' grievance procedure; otherwise, however, the parties were permitted to negotiate over its scope.[15]

Unlike the Statute, a broad scope grievance procedure, was not mandated. However, there was an evolution towards the broad scope procedure. While, at first, grievances were permitted only over questions relating to the interpretation of the parties' collective bargaining agreement, beginning in 1975, grievances were extended to the interpretation and application of agency policies and regulations.[16] Yet, even before then it was common for ar-

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Executive Order 11491, as amended (1975), [*1975 Report*], *reprinted in* House Committee on Post Office and Civil Service, 96 Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (hereinafter *"Legislative History"*).

[12] *See* President's Task Force, *A Policy for Employee Management Cooperation in the Federal Service, Report of the President's Task Force on Employee-Management Relations in the Federal Service* (1961), *reprinted in Legislative History* at 1177, 1205-06; Interagency Study Committee on Federal Labor Relations, *Report and Recommendations, Labor-Management Relations in the Federal Service* (1969), [*1969 Report*], *reprinted in Legislative History* at 1218, 1239-41.

[13] *1969 Report, reprinted in Legislative History* at 1241; *1975 Report, reprinted in Legislative History* at 1315.

[14] *1975 Report, reprinted in Legislative History* at 1314-19.

[15] *Id.*

[16] *Id.*, 1314-1316.

bitrators to rely upon statute and regulation in resolving disputes.[17] Similarly, the employer's position is not advanced by the want of grievances over contracting out disputes under the earlier regime. As noted, the more significant actions by the employer were excluded from its coverage. More importantly, however, it was not until after the Statute's enactment that the Circular, in 1979, was revised so as to provide a standard against which employer actions could be measured. Absent such a standard, grievances would have been futile.

C. The Statute's legislative history underscores the intention of Congress to require arbitral review to assure that management's reserved rights are exercised "in accordance with law."

1. As AFGE has shown, the employer, through strained and convoluted attempts at statutory construction, has sought to use the management rights provision to defeat its obligation to submit to arbitration any disputes involving contracting out determinations and, by logical extension, to submit to arbitration any disputes involving the exercise of any management prerogative listed in section 7106(a)(2). However, Congress was well aware of this danger, specifically warning that management might seek to impose that construction upon section 7106. To prevent this occurrence, Congress left unmistakable direction in the legislative record that the FLRA and the courts should reject any such attempt.

First, Congress made clear that section 7106, rather than defeating the collective bargaining obligation, was to be given a narrow reading. As stated by Representative Udall, in the sectional analysis accompanying the substitute bill which he sponsored and became law:[18] "[T]he "management rights" section . . . is to be treated

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[17] *Id.*, 1318-19.

[18] *See NTEU v. FLRA*, 691 F.2d 553, 559, n. 59 (D.C. Cir. 1982).

narrowly as an exception to the general obligation to bargain over conditions of employment." [19] This intention was repeated by Representatives Ford and Clay, also proponents of the Statute.[20] As stated by Representative Clay: "[T]he management rights [provision] is to be construed as a narrow exception to the general obligation to bargain in good faith. . . . If the [FLRA and the courts are] faithful to th[is], the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired." [21]

Congress was aware that management, in seeking to undercut the reach of its collective bargaining obligation, might attempt to draw upon labor relations experience in the federal sector prior to the Statute's enactment, notwithstanding as shown, several differences between the two systems. Here, too, it made clear its intention that such efforts must fail. As stated by Representative Ford: "Too often the [Federal Labor Relations] Council interpreted the management rights [provision] so broadly as to stifle an attempt by both management and employees to address common recognized problems . . . ;" adding,

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[19] 124 Cong. Rec. 29183 (1978), *reprinted in Legislative History* at 924.

[20] *NTEU v. FLRA*, 691 F.2d at 560.

[21] 124 Cong. Rec. 29187 (1978), *reprinted in Legislative History* at 931-933. Congress recognized that the management rights clause, if not faithfully applied in the narrow sense intended, could undermine the very purpose of establishing a system of collective bargaining in the federal service. In this regard, Representative Ford states: "The concept of negotiability is and must be a dynamic and growing one. If not, [f]ederal sector labor relations must fail because the energies of management and labor will be diverted from consideration of important labor relations problems to the litigation of the scope of exceptions to the general bargaining obligation." 124 Cong. Rec. 29198 (1978), *reprinted in Legislative History* at 956.

"A principal goal in revising the management rights [provision] is to change the current situation and, wherever possible, encourage both parties to work out their differences. . . ." He continued: "[T]he listed management rights [are] to be narrowly construed exceptions to the general obligation to bargain . . . and . . . section 7106 [is to] be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal." [22]

The legislative record also clearly establishes the relationship which Congress intended between the management rights provision and the statutory grievance procedure. In this connection, Congressman Ford explained: "Section 7103(a)(9) includes within the definition of grievance, any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. Under this definition as adopted by the conferees, so long as a rule or regulation affects conditions of employment, infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation . . . is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right." [23] Similarly, as noted by the court of appeals (Pet. App. 14a, n. 20), Congress explained the interplay between the statutory grievance procedure and management's exercise of its reserved authority under section 7106(a)(2) as follows:

> *The new language preserves management's right to make final decisions in the [reserved] areas, in accordance with applicable laws.* . . . [M]anagement

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[22] 124 Cong. Rec. 29198-29199 (1978), *reprinted in Legislative History* at 953-956.

[23] 124 Cong. Rec. 38717, *reprinted in Legislative History* at 998.

> has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management right to "remove" would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement. [Emphasis added.] [24]

The statement appears in the sectional analysis accompanying the Udall substitute,[25] which also states that all the management rights listed in section 7106(a) are "reserved in accordance with law." [26] The legislative history also suggests that Congress did not intend the language of section 7106 to restrict the scope of the statutory grievance procedure. Thus, the House Committee's report states: "The effect of this section is to place limits on the number of subjects about which agency management may bargain with a labor organization." H.R. Report 1403, 95th Cong., 2d Sess. 43; *reprinted in Legislative History* at 689. Even the Collins Amendment, which was offered as an alternative to the Udall substitute and which more closely paralleled the Executive Order than the latter,[27] contained a narrower grievance mechanism, but one which was characterized as "permit[ting] grievance arbitration to cover *any matter within the authority of an agency to decide*" excluding specific items such as political activities, classification, and insurance matters. [Emphasis added.] [28] Furthermore, while the legislative

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[24] 124 Cong. Rec. 29183 (1978), *reprinted in Legislative History* at 924.

[25] *Id.*

[26] *Ibid.*

[27] 124 Cong. Reg. 29174, *reprinted in Legislative History* at 906.

[28] *Id.*

history sheds little light specifically on the contracting out language in section 7106(a)(2), the absence of any evidence to suggest that Congress intended that an agency's contracting out authority be treated differently than the exercise of any other prerogative listed in section 7106(a)(2), indicates the intention of Congress not to exclude contracting out disputes from the grievance process.[29] In sum, the legislative record supports the plain language of sections 7103(a)(9) and 7121 that complaints arising in the workplace and affecting unit employees are covered by the statutory grievance procedure unless excluded by operation of those sections. In any event, it is clear that section 7106(a)(2) was not intended by Congress to exclude from the grievance procedure disputes that relate to contracting out or the other subjects there enumerated.

D. Circular A-76 is a "law, rule, or regulation" within the meaning of the Statute.

The union's proposal simply incorporates the statutory requirement that the union may challenge the employer's contracting out actions through the grievance mechanism to assure compliance with applicable laws, rules, and regulations. It imposes no new standards upon agencies, only holding them to what is already required by law, as recognized by the FLRA and the court of appeals. (Pet. App. 9a, 41a).

As already discussed, see 4-8 herein, in the contracting out area, some legal requirements are established by

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[29] At the time the statutory scheme was crafted, it was well-recognized that contracting out was a routine subject of negotiations between labor and management in the private sector, which often was the subject of arbitration. *See* Fairweather, *Practice and Procedure in Labor Arbitration* (2d Ed. 1983) 469-93; Elkouri and Elkouri; *How Arbitration Works* (3d Ed. 1973) 501-11; *see also Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203, 211-13 (1964).

statute for certain agencies. More generally, the requirements of Circular A-76 have been incorporated, in effect, into the Federal Acquisition Regulations, which govern procurement actions by the entire federal government. Individual agencies, in turn, have incorporated the terms of the Circular or established other rules relating to contracting out in their own regulations. Nevertheless, given the employer's virtually exclusive focus upon Circular A-76, it is necessary to dispel two notions: first, that agencies are generally unrestrained in making contracting out determinations (Pet. Br. 12-13, 24, 25); and, second, that Circular A-76 is not a rule affecting conditions of employment, which, therefore, lies outside the scope of the statutory grievance procedure (Pet. Br. 23-29, 37-38).

To counter the employer's claims, a detailed examination of the Circular is required. After explaining the restrictions which its terms impose upon individual agencies, we will demonstrate that the Circular is a "rule" within the meaning of the Statute and, that, therefore, disputes concerning its interpretation or application are subject to the statutory grievance procedure.

1. a. The terms of the Circular and its supplement clearly disprove the contention that agencies have considerable leeway in conducting cost comparisons or in otherwise contracting for services covered by it. The opposite is true. Much of the Circular contains specific methodology for quantifying, measuring, or otherwise accounting for the employer's costs in performing a function, which, correctly applied, will yield only one result and will determine whether the function is to be performed by contract or in-house.

The Supplement, including a comprehensive handbook for conducting cost comparisons,[30] applies to all execu-

[30] Copies of the supplement were submitted by the employer to the court and served on the parties in connection with its petition.

tive agencies and "sets forth procedures to be used for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." ¶¶ 1, 7a, 48 Fed. Reg. 37114. It provides that if private performance of a function is permissible, a comparison of the cost of contracting and the cost of in-house performance shall be conducted, as specifically prescribed by the Circular and its Supplement, to determine who will do the work. *Id.*, ¶ 5a. As a general rule, government performance is authorized only if a cost comparison demonstrates that the government is operating, or can operate, the activity at a lower estimated cost than by contract. *Id.*, ¶ 8d, 48 Fed. Reg. 37115.

The Cost Comparison Handbook establishes the standard cost factors to be applied in conducting the cost comparison and requires that all significant costs be included in the comparison, and that the in-house estimate be based upon "the most efficient and cost-effective in-house operation needed to accomplish the requirements in the performance work statement." *Id.*, I-11, 12. Agencies are required to provide for review of cost comparisons by an organizationally independent component of the agency to assure "the currency, reasonableness, accuracy and completeness of the cost comparison." *Id.*, I-13, 14.

The Handbook continues with specific, detailed instructions regarding the development of cost comparisons. *Id.*, II-1, based upon the principle that "The Handbook must be used . . . to ensure . . . fair, reasonable, and consistent cost studies." *Id.*, IV-1. To assure that fair and equitable comparisons are achieved, the Handbook provides line-by-line instructions for completing a series of worksheets (personnel, material and supply costs, depreciation, insurance, overhead, and so on), *id.*, Part IV, Chapters 3, 4, culminating in completion of a cost comparison form, the "bottom-line" of which dictates whether the activity will be performed by contract or in-house by fed-

eral employees. *Id.*, IV-45, 46. The Handbook requires "document[ation] to provide a record of information to support each line of the cost study." *Id.*, IV-6.

While the Handbook allows for some judgments to be made by agencies (*e.g.*, tools for use in determining in-house staffing estimates, *id.*, IV-7), the comparison is largely the ministerial application of prescribed cost factors and computational procedures. The Handbook even restricts agencies in areas where they are permitted some discretion (*e.g.*, basis for computing personnel costs once workload is established in the mode deemed most efficient, *see id.*, IV-9). The Handbook prescribes a specific method, cost figures, or procedure for the following: inflation, IV-7; conversion for productive work hours, IV-8; completion of personnel costs, fringe benefits (including standard factors for retirement, FICA, insurance, and workers compensation), IV-10; pricing material from other government agencies, IV-16, 17; depreciation, IV-19 to 21; rent, IV-23; maintenance and repair, IV-23; utilities, IV-23; insurance, IV-23 to 27; certain overhead costs, IV-27 to 32; tax adjustments, IV-35, 40; contract administration, IV-36; labor related conversion costs, IV-38. In sum, Circular A-76 establishes specific, detailed and binding rules upon federal agencies that restrict their authority to make contracting out determinations, leaving them very limited discretion.

b. Although the Circular purports to disclaim any construction of its terms "as creating any substantive or procedural basis for anyone to challenge any [action] or inaction," 48 Fed. Reg. 37114, ¶ 7.c.(8), the Comptroller General (CG) has routinely applied its provisions to assure that the rights of bidders or offerors are protected.[31] Indeed, the decisions by the Comptroller General demon-

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[31] The Comptroller General has denied unions any standing to participate in bid protests involving questions relating to Circular A-76. *See Federal Employees Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244 (1985).

strate the ability of a third party to apply the provisions of the Circular so as to require strict agency conformance where so mandated, while preserving an agency's discretion where the Circular so allows.[32] That the Comptroller General has routinely applied the provisions of the Circular so as to assure that agencies engage in fair procurement practices belies the employer's position that its provisions are merely advisory or incapable of review without intrusion into areas reserved for an agency's sole discretion.[33]

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[32] *See e.g., Pan Am World Services, Inc.*, B-215829, June 24, 1985, 85-1 CPD ¶ 712 (CG will review protests over contracting out decisions to determine whether agency adhered to applicable procedures and groundrules; upheld protest involving agency's failure to follow the handbook on cost comparisons); *Mercury Consolidated, Inc.*, 63 Comp. Gen. 411, 413 (1984) (CG will not uphold a protest where Circular leaves matter to agency's judgment); *Holmes & Narver Services, Inc. and Morrison-Knudson Company, Inc.*, B-212191, Nov. 17, 1983, 83-2 CPD ¶ 585 (agency failed to fully cost direct labor as required by Circular; agency failed to comply with OMB modification to Circular concerning allocation of a specific element of overhead costs; agency's appeal board correctly found error in wage computations, noting in connection with bidder's allegation of error that CG would not question some elements of contracting process unless agency shown to have acted unreasonably); *Contract Services Company, Inc.*, B-208180.2, Sept. 16, 1983, 83-2 CPD ¶ 331 (in protest challenging application of Circular and related agency regulations, CG noted that "we will not second-guess, the [agency's] perception of its own staffing requirements" in estimating its direct labor costs for in-house performance, noting that the agency's own regulation allowed the use of particular methodology at issue); and *Contract Service Company, Inc.*, B-210796, Aug. 29, 1983, 83-2 CPD ¶ 268 (CG would not second-guess agency where Circular merely required an estimate of retained pay costs; however, CG applied Circular's provisions where specific to determine validity of agency's calculation of costs and actual computations).

[33] The employer, while completely silent in its brief about the Comptroller General's important role in assuring compliance with the Circular, seeks to bolster its position that the Circular does not restrain actions of individual agencies by drawing upon the largely unsuccessful efforts of unions to obtain judicial review of particular

c. The Statute defines both the statutory grievance procedure and the duty to bargain, in part, by reference

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contracting out determinations (Pet. Br. 25-28). In rebuttal, a few points need to be made.

First, while the employer suggests otherwise, the federal courts have not shut the door completely on challenges to contracting out actions by federal agencies. *See Lodge 1858, American Federation of Government Employees v. Webb*, 580 F.2d 496, *cert. denied*, 439 U.S. 927 (1978) (in reaching merits, court denied union's challenge to service contracts as contrary to civil service laws and NASA's enabling statute); *International Graphics, Division of Moore Business Forms, Inc. v. United States*, 5 Cl.Ct. 100, 105-107 (1984) (recognizes requirements of Circular as binding upon contracting agencies as a prescribed condition of the procurement process); *Accord, International Graphics, Division of Moore Business Forms, Inc. v. United States*, 4 Cl.Ct. 186, 197-199 (1983). *See also International Association of Firefighters, Local F-100 v. U.S. Department of the Navy, Naval Education and Training Center, Newport, Rhode Island*, 536 F.Supp. 1254 (D.R.I. 1982); and *Advo-System, Inc. v. Kreps*, 471 F.Supp. 116 (D.D.C. 1979).

Second, while judicial review, until recently, has been largely unsympathetic to litigants seeking to use Circular A-76 as a basis upon which to state a cause of action, *those efforts were based upon the 1967 version of the Circular, which was much less specific than subsequent versions and lacked a detailed methodology for conducting cost comparisons. International Graphics, Division of Moore Business Forms, Inc. v. United States*, 4 Cl.Ct. 186, 198, n. 14 (1983). The earlier Circular contained a provision stating that "[n]o specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances." Circular A-76, 7c(3) (Revised 1967), *quoted* in *Local 2855, AFGE v. Brown*, 602 F.2d 574, 581 (3rd Cir. 1979). Now there exist not only specific rules established by the Circular and its Supplement but, as noted, ample precedent by the Comptroller General, applying these provisions, to serve as guidance to courts or other decisionmakers. *Cf. International Graphics*, 4 Cl.Ct. at 198-199. Furthermore, to the extent that courts have denied unions standing to attack agency actions in the contracting out area, or disposed of suits on similar grounds, the adverse precedent is not material to the instant case, given the union's standing in the arbitral process and the FLRA's review procedures under 5 U.S.C. § 7122.

to rules and regulations affecting the employment condition. "Grievance" is defined to include complaints over any "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9).[34] The duty to bargain specifically contemplates bargaining over matters (though with some restrictions), which are also the subject of a "rule or regulation." 5 U.S.C. § 7117(a) and (b); *see* 5 U.S.C. § 7116(a)(7).[35]

On review, the employer does not take issue with the relationship between the Circular and its effect upon the EEOC's bargaining obligation *vis a vis* AFGE (See Pet. Br. 43-45). It, nonetheless, maintains that there exists an unarticulated distinction between the status of the Circular, on the one hand, under the statutory grievance mechanism, and, on the other hand, its status in the other circumstances provided for by the Statute.

The distinction is unsupportable. Congress is presumed to mean the same thing when it uses the same or similar language in different sections of a statute, absent strong indications otherwise—not present in this case. The weakness of the employer's position is underscored by the fact that it has not made this argument before the FLRA or earlier in the judicial review proceedings.[36]

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[34] *See* 5 U.S.C. § 7103(a)(14), which defines "conditions of employment," in part, in terms of "personnel policies, practices, and matters whether established by rule, regulation, or otherwise."

[35] The Statute also defines, in terms of "rule or regulation," "national consultation rights" (the right to be informed of any governmentwide rule or regulation affecting substantive conditions of employment proposed by any agency and the opportunity for a union to present its views and recommendations). *See* 5 U.S.C. § 7117(d)(1) and (2).

[36] 5 U.S.C. § 7123(c) provides: "No objection that has not been urged before the Authority . . . should be considered by the court unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

Contracting out disputes, as evidenced both by practice in the private sector, see note 29 herein, and the Circular's own terms, have a direct bearing on federal employees. Moreover, Circular A-76 and agency regulations based on its provisions expressly recognize the impact of contracting out upon employees and unions, providing them rights to information and participation in the contracting out process, *e.g.*, Air Force Regulation 26-1 § 5-8 (1981), as well as providing affected employees the right of first refusal for employment openings under the contract, Supp. I-13; priority consideration for available positions within the agency, *id.*, I-18; and the payment of training and relocation expenses relating to placement. *Id.*, I-19; *see also* Army Regulation 5-20 §§ 3-1 to 3-4 (1985).

As the various references in the Statute make clear, Congress intended an agency's obligation to extend beyond standards that are established by the formal rulemaking procedures under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* In so doing, it recognized that many policies, standards or practices of critical importance to federal employees have been and would continue to be established by less formal means. Thus, the reference in the Statute to "rule," as opposed to simply "regulation," and the use of the more general "law" to refer to the whole host of requirements prescribed by and for federal agencies. This express recognition that the conduct of federal employers is often set by means short of formal regulation was also reflected under the executive order program which governed labor relations in the federal sector prior to the Statute's enactment. *See* § 11 of E.O. 11491, as amended.[37] In addressing the relationship between the duty to bargain and "laws and regulations," the drafters of the Order specifi-

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[37] *Reprinted in Legislative History* at 1342, 1345.

cally included "policies set forth in the Federal Personnel Manual," [FPM], *id.*, even though it is not established as a formal regulation and, therefore, possessed a status as a "rule" in the same sense as the Circular. Moreover, there is no question but that the FPM is a rule within the meaning of the Statute. *E.g., U.S. Naval Air Station, Key West, Florida and AFGE, Local 1566,* 16 FLRA 1077 (1984). The Circular, unlike the FPM, however, is established in accordance with a process that parallels "notice and comment" rulemaking under the APA. *See* 48 Fed. Reg. 37110 (1983); *see also* petitioner's brief, 5, n.3. Thus, *a fortiori*, the Circular is a rule under the Statute. Moreover, any remaining doubt can be eliminated by consideration of the legislative history of the Statute. The Conference Report states:

> The conferees specifically intend, . . . that the term "rules or regulations" be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply. The right of labor organizations to enjoy national consultation rights will also include such official declarations of policy which are binding on officials or agencies.

H.R. Rep. No. 1717, 95th Cong., 2d Sess. 158-59.[38] Thus, the conclusion is inescapable that A-76 is a rule or law within the meaning of the Statute.

E. Arbitral review of contracting out determinations promotes the Statute's purposes and is fully consistent with its traditional function in labor-management relations.

1. The employer misconstrues the nature of grievance arbitration in the federal sector, ignoring its significant differences from the private sector. Particularly, the EEOC overlooks arbitration's important role in the fed-

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[38] *Reprinted in Legislative History* at 826-27.

eral sector in deciding, as a matter of course, disputes requiring the interpretation and application of statutes, rules, or regulations. As stated by a member of the FLRA:

> [T]he framework in which arbitration in the federal sector must operate . . . is the immense body of law, which governs nearly every aspect of the employment relationship between federal employees and their employer the Federal Government. . . . [W]hile in the private sector, it is often enough to look to just the terms of the negotiated agreement to resolve a dispute, this is usually not the case in the federal sector. The arbitrator . . . must turn to those provisions of the statutes and regulations which govern the matter as well as the appropriate contract provisions. While there may be a common law of the shop in many industries in the private sector, *there is a statutory law of the workplace in the federal sector.* [Emphasis added.]

Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981). This distinction between grievance arbitration in the federal and private sectors has been acknowledged by the leading authorities in the field:

> The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function . . . in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike.
>
> The dual role . . . probably was a principal factor in the congressional decision (1) to specify that each collective agreement in the federal sector "shall"

> provide a grievance procedure with arbitration, (2) to specify that all grievances "shall" be subject to the grievance and arbitration procedures except those specifically excluded by the collective agreement or statute, and (3) to define the term "grievance" very broadly.

Elkouri and Elkouri, *How Arbitration Works* (4th Ed. 1985) 52-53. As these commentators observe, arbitration in the federal sector has as a principal goal the application of law, rule, and regulation in resolving disputes. As such it is a goal to be fostered, not one which, as the employer suggests, to be avoided.

2. The employer's claims concerning the role and effect of arbitral review in the federal sector and its imagined consequences to the contracting out process are unfounded. (Pet. Br. 20-22). To the extent the employer suggests that arbitrators may be unable to decide questions of law, rule, or regulation, the authority is to the contrary. *See e.g., Elkouri and Elkouri*, Chapter 10; *Devine v. White*, 697 F.2d 421, 438 (D.C. Cir. 1983). More importantly, Congress has determined that arbitrators shall decide such questions. As this court has recognized, the statutory grievance procedure implements a major purpose of the Civil Service Reform Act—"to strengthen the position of federal unions and make the collective bargaining process a more effective instrument of the public interest." *Cornelius v. Nutt*, 105 S.Ct. 2882, 2885 (1985). Insofar as the employer suggests arbitrators are incapable of preserving managerial authority, one need only look to the widespread and contrary experience in the private sector. *See Elkouri and Elkouri*, Chapter 13.

Federal arbitrators presented with contracting out disputes have substantial precedent available to assist them, both in terms of applying Circular A-76 and the provi-

sions of the Statute.[39] If this is not enough assurance to management, the EEOC overlooks the opportunity it has to obtain at the bargaining table whatever additional assurances it deems necessary to protect its prerogatives. In enacting the Statute, Congress clearly acted on the premise that "[i]n collective bargaining, government managers are presumably competent to look out for the government interests." *Department of Defense v. FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981). Thus, for example, an employer, through negotiations, could seek such contractual standards and burdens of proof as it believes necessary or favorable to its position. Whatever concern management may have over delay and its attendant expense can also be remedied by insistence upon language requiring prompt submission of disputes to, and resolution by, the arbitrator, perhaps similar to the 30-day limit prescribed by Circular A-76 for agency review of protests to the contracting out process. In this regard, we note that it is not uncommon for federal sector agreements to provide for expedited arbitration proceedings.

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[39] This includes the uniform body of case law developed by the Comptroller General and the FLRA and the clear signposts of sections 7103, 7106, and 7121(c) available to assist arbitrators to avoid substituting their judgment on matters reserved to managerial determination. This is in contrast to private sector experience where management rights are based on the parties' particular contractual arrangement—oftentimes requiring difficult interpretative questions—or on even less precise formulations of matters deemed "inherent" to the employer's operations. The greater clarity and uniformity which is available to arbitrators in the federal sector should largely eliminate, in fact and perception, incursion by arbitrators into matters reserved for management. This consideration, no doubt, influenced the thinking of Congress in establishing a broad statutory grievance procedure. Furthermore, FLRA review remains available in those rare circumstances where arbitrators might exceed their authority. 5 U.S.C. § 7122.

If such provisions were reasonably necessary to protect the employer's interests, absent agreement with the union, there is no question that the provisions would be imposed upon the parties by the Federal Service Impasses Panel. *See* 5 U.S.C. § 7119(c)(5)(B).

3. Contrary to the employer's suggestion (Pet. 13a-15a), neither the court of appeals, nor the FLRA, has held that an arbitrator may substitute his or her judgment for some element of the contracting out process that is reserved to management's discretion. Rather, each held only that section 7106(a)(2)(B) does not foreclose arbitral review of the employer's actions to assure that they conform with applicable law. Arbitrators in the federal sector are constantly called upon to address questions of law. Moreover, it is not unusual even for arbitrators in the private sector to be called upon to review the propriety of management conduct in disputes requiring economic analysis or cost accounting, processes similar to what is required in reviewing an agency's compliance with Circular A-76. *See Elkouri and Elkouri* (4th Ed.) 483-92, 495-99, 536-37, 817-23, 847-48; *see also* Fairweather, *Practice and Procedure in Labor Arbitration* (2d Ed. 1983) 532-40. It is only because this case arose in the context of a negotiability dispute that the employer can raise the spectre of an arbitrator deciding matters that have been reserved for the government manager's discretion. In the unlikely event that an arbitrator would intrude upon the employer's discretionary authority, the arbitral decision is subject to review by the FLRA.

4. The FLRA is charged with the responsibility under 5 U.S.C. § 7122 to review exceptions to arbitral awards to assure that an award is not deficient as "contrary to any law, rule, or regulation; or . . . on other grounds similar to those applied by Federal courts in private sector labor-management relations." *See* 5 C.F.R. § 2425.1 *et seq.*

The problems which the employer envisions from arbitral review, if they arise, therefore, would be cognizable by the FLRA.[40] The FLRA would be able to review, for example, a contention that an arbitrator's decision interfered with a management right by substituting arbitral judgment for a matter left solely to management discretion; that an award conflicts with a provision in Circular A-76 or other applicable law, rule, or regulation; or that the parties' agreement either did not encompass any contracting out disputes or excepted a particular dispute from its coverage.[41] Moreover, the FLRA would be able to decide the questions in a specific factual context, after labor and management have been given a full opportunity

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[40] For a survey of the grounds upon which review from arbitral awards may be sought in the federal sector, *see* Frazier, *FLRA Policy and Practice on Arbitration Awards: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 9, 1981).

[41] The FLRA has shown itself effective in protecting management rights from encroachment by arbitrators. *E.g., Professional Air Traffic Controllers Organization and Federal Aviation Administration*, 5 FLRA 763 (1981). While the FLRA, to date, has not ruled on any exceptions to arbitral awards involving contracting out issues, its decisions involving the legality of bargaining proposals concerning this subject show that the FLRA has been careful to protect reserved management authority, while, at the same time, providing unions and employees their rights under the Statute. *See AFGE, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California*, 19 FLRA No. 118 (1985); *AFGE, Local 225 and Department of the Army, U.S. Army Armanent Research and Development Command, Dover, New Jersey*, 17 FLRA 417 (1985); *National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of Monterey, California*, 14 FLRA 761 (1984), *rev'd sub nom Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985); *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 FLRA 669 (1981); and *National Federation of Federal Employees and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA 574 (1981).

to develop evidence and argument and with the benefit of an arbitral decision on the issues.[42] Furthermore, the FLRA has determined that arbitral awards are not binding upon a federal employer until the FLRA rules upon any exceptions filed with it under section 7122. *U.S. Soldiers and Airmen's Home, Washington, D.C.*, 15 FLRA No. 26 (1984), *appeal pending sub nom. AFGE, Local 3090 v. FLRA*, No. 84-1439 (D.C. Cir.).[43] See 5 CFR § 2429.8.

5. The employer's claims that arbitral review will impede the government's efforts to save money by contracting out where cost-effective to do so are also unconvincing. Arbitral review can ensure that employers correctly cost out the relative expenses of performing work "in-house" and by contract. Where an employer, by ignoring requirements imposed by law, rule, or regulation, incorrectly determines that private enterprise can perform the function at less cost than by government personnel, arbitral review vindicates not only the rights of affected employees but also the public's interest in having work

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[42] Yet unresolved in the federal sector, as noted by the employer (Pet. Br. 22, n. 12), is the extent to which, if at all, FLRA decisions under section 7122 are subject to judicial review.

[43] Thus, there is no merit to the employer's contention (Pet. 10) that arbitral review will bar agencies from going ahead with plans to contract out work. If an employer elects to proceed with a decision to contract out work, despite a challenge to its legality or a finding by an arbitrator to that effect, it may do so. It is hardly unjust that an employer found to have acted unlawfully may have to remedy the situation, perhaps by rehiring employees who were adversely affected and making them whole for lost wages and other benefits. In this connection, it bears repeating that the FLRA's decision imposes no new requirements upon employers. Under the decision, as before, employers are required to comply with the standards imposed by Circular A-76 and other applicable laws, rules, and regulations.

performed in a manner which achieves the greatest savings.[44] Thus, arbitral review will serve not only to save the public monies in particular cases where an employer has violated law, rule, or regulation but will serve as a prophylatic means to assure that government managers do not abuse the public trust in obtaining services for the government. In so doing, arbitral review will promote an "effective and efficient government." [45]

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[44] For a description of the types of contracting out errors made by agencies in conducting cost comparisons and otherwise making contracting out determinations, *see* Comptroller General, *Factors Influencing DoD Decisions to Convert Activities from In-House to Contractor Performance, Report to the Chairmen, Senate and House Committees on Armed Services* (1981).

[45] The dynamics of contracting out will be little influenced by arbitration. As discussed, there is little discretion provided agency officials in deciding whether work is to be let by contract or not. Unless a function is governmental in nature (and as such required to be performed by government personnel), management must undertake a vigorous cost comparison which determines how the function will be performed. To the extent arbitral review may force the employer to be more precise in its computations, this only helps achieve the ultimate objective of the Circular. Yet even if this was somehow not a salutary result, arbitral review will not be the sole culprit. As the employer has pointed out in other contexts, agencies are themselves directed to provide an internal appeals procedure to ensure agency compliance with the Circular and other contracting out requirements; and the Comptroller General already fills a similar role. If the crux of the employer's complaint is third party review, such review now exists in the form of bid-protests to the Comptroller General. Thus, in sum, there is no basis to the employer's concerns over the hypothetical case where a "prudent manager [will] forego the letting of an otherwise desireable contract" (Pet. Br. 35) because his agency's actions will be subject to arbitral review.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

5 U.S.C. § 7103(a)(9) provides:

"[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. § 7103(a)(14) provides:

"[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute[.]

5 U.S.C. § 7106 provides:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any author-

ity under this section by such management officials.

5 U.S.C. § 7117(a)(1) provides:

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. § 7121(a)-(c) provides:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

• • • •

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding

arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subsection III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

* * * *

5 U.S.C. § 7122(a) provides:

Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

No. 84-1728

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTION PRESENTED

Whether a collective bargaining proposal that does not substantively limit the authority of a federal agency, in accordance with applicable laws, to make determinations with respect to contracting-out, but instead does no more than restate an agency's existing obligation to comply with requirements in Office of Management and Budget Circular A-76 and other applicable laws and regulations concerning contracting-out, is within the duty to bargain under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (Pet. App. 40a-48a) is reported at 10 F.L.R.A. 3; the Authority's denial of the Equal Employment Opportunity Commission's request for recommendation is reported at 11 F.L.R.A. 720 (FLRA App. 1a-2a).

JURISDICTION

The Authority issued its decision and order on September 2, 1982. The Equal Employment Opportunity Commission requested reconsideration of that decision on September 16, 1982. On November 1, 1982, EEOC filed a petition for review of the Authority's decision and order in the court of appeals; on December 8, 1982, the Authority filed a cross-application for enforcement. On March 18, 1983, the Authority issued an order

denying EEOC's request for reconsideration of the Authority's decision and order.

The judgment of the court of appeals was entered on September 21, 1984 and a timely petition for rehearing was denied on December 3, 1984. On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 2, 1985. The petition was filed on that date and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1982 & Supp. II 1984) are reproduced in the appendix to this brief (FLRA App. 3a-6a).

STATEMENT

A. The Statutory Scheme For Resolving Negotiability Appeals In The Federal Sector

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute ("the Statute"), as amended, 5 U.S.C. 7101-7135 (1982 & Supp. II 1984). The Statute was enacted as section 701 of the Civil Service Reform Act of 1978.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority"), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree*

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[1] Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

Coalition v. *Devine,* 751 F. 2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA,* 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined as "personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * * ." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B); *NFFE, Local 1167* v. *FLRA,* 681 F.2d 886, 892 (D.C. Cir. 1982). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3); see *AFGE, Local 2782* v. *FLRA,* 702 F.2d 1183 (D.C. Cir. 1983).

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal is within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of

nonnegotiability to the Authority. 5 U.S.C. 7117(c).[2] The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891. If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The Authority's decision addresses only the negotiability of the bargaining proposal; the Authority neither considers the merits of the proposal nor orders the agency to agree to it. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12). If the parties, in the course of their collective bargaining, reach an impasse, either party may request the assistance of the Federal Service Impasses Panel. 5 U.S.C. 7119(b). The Impasses Panel is empowered to take whatever action is necessary and not inconsistent with the Statute to resolve an impasse, including ordering parties to agree to specific proposal language. See 5 U.S.C. 7119(c)(5)(B)(iii). See also *e.g.*, *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984); *Department of the Treasury* v. *FLRA*, 707 F.2d 574, 577 n.7 (D.C. Cir. 1983). The Impasses Panel will consider the reasonableness of any proposal at issue in determining what contract language will be imposed. *E.g., Department of the Air Force, 341st Combat Support Group, Malmstrom Air Force Base, Montana and Local 2609, AFGE*, Case No. 82 FSIP 142 (1983) slip op. 2; see also *Veterans Administration Medical Center, Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982).

The Statute requires that, at the request of either party, the product of collective bargaining negotiations be reduced to a written collective bargaining agreement. 5 U.S.C. 7103(a)(12), 7114(b)(5). Such a collective bargaining agreement must

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[2] If the exclusive representative wishes to appeal, it first obtains a written allegation of nonnegotiability from the agency. 5 C.F.R. 2424.3. The exclusive representative then files a petition seeking the Authority's determination of the negotiability issue. 5 C.F.R. 2424.4. The agency is served with a copy of this petition, to which it may respond with a statement either withdrawing its allegation that the proposal is nonnegotiable or setting forth reasons supporting its position of nonnegotiability. 5 C.F.R. 2424.6(a)(2). The exclusive representative then has a right to respond to the agency's statement of position. 5 C.F.R. 2424.7.

"provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance' ";[3] Section 7121 lists only five subject matters that are statutorily excluded from the permissible scope of the negotiated grievance procedure.[4]

B. The Proceedings Before The Authority

During the course of collective bargaining agreement negotiations with the Equal Employment Opportunity Commission ("EEOC"), the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals ("AFGE") proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.[5]

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[3] H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 686 (Comm. Print No. 96-7) *(Legis. Hist.)*.

[4] The five subject matters excluded are:

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. 7121(c). See, *e.g.*, *The Veterans Administration Medical Center, Togus, Maine and AFGE, Local 2610*, 17 F.L.R.A. No. 129 (1985); *Federal Aviation Administration, Department of Transportation, Tampa, Florida and Federal Aviation Science and Technological Association, NAGE, Tampa, Florida*, 8 F.L.R.A. 532 (1982). Parties can, in negotiations, agree to exclude additional matters. 5 U.S.C. 7121(a)(2).

[5] OMB Circular A-76 ("the Circular") applies to Executive agencies and provides direction for agency decisions whether to contract-out to private enterprise for products and services the government needs. 44 Fed. Reg. 20556 (1979), as amended by 45 Fed. Reg. 69322 (1980); 47 Fed. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37114 (1983); 50 Fed. 32812 (1985).

(Pet. App. 40a.) EEOC alleged that the proposal was nonnegotiable and refused to bargain over it (*ibid.*). To resolve the dispute, AFGE sought a negotiability determination from the Authority pursuant to 5 U.S.C. 7117(c) (*ibid.*). Upon consideration of the record before it, the Authority issued a decision finding the proposal negotiable (Pet. App. 40a-48a).

The Authority determined that the proposal did not impair EEOC's right to make contracting-out determinations because the proposal would not impose any substantive limitations upon management's right to make contracting-out determinations apart from those already existing (Pet. App. 41a). The Authority distinguished this proposal from one it had found nonnegotiable in *NFFE, Local 1167 and Department of the Air Force Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom. NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982). In that case the proposal would have required the agency to comply with the specific terms of OMB Circular A-76 regardless of whether the Circular were to be revised or rescinded (Pet. App. 41a). By locking management into observing specific terms in the Circular, the Authority stated in that case, the proposal impermissibly would have imposed its own limitations on management's right (*ibid.*). The instant proposal, however, simply obligated EEOC to act in accordance with whatever laws and regulations may be extant at the time EEOC exercises its right to contract-out and therefore the proposal did not narrow the scope of the discretion the Statute reserved to EEOC as nonnegotiable (*ibid.*).

The Authority also rejected EEOC's claim that because the proposal would subject grievances concerning the application of the Circular to the negotiated grievance procedure, the proposal conflicted with the Circular and was thus nonnegotiable (Pet. App. 42a). The Authority, quoting *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981), stated that government-wide "regulations . . . may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under section 7121 of the Statute" (*ibid.*). In this regard, the Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the

grievance procedure unless the parties exclude them through bargaining (*ibid.*). Accordingly, the Authority concluded that even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (Pet. App. 42a; emphasis in decision).

Finally, the Authority noted that, to the extent EEOC had argued that the proposal would change the scope and coverage of the parties' negotiated grievance procedure, EEOC had misinterpreted the legal effect of the proposal (Pet. App. 42a). The Authority stated that even in the absence of the proposed contract provision, under the Statute disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless a particular grievance is inconsistent with law (see *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669, 673 (1981)) or unless the parties exclude such grievances through negotiations (see, *e.g.*, *AFGE, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 F.L.R.A. 320 (1980)) (*ibid.*).

EEOC sought reconsideration of the Authority's decision, requesting in part that the Authority "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute" (FLRA App. 2a). The Authority denied the request, finding that EEOC in essence was asking the Authority to make arbitrability determinations in the absence of a specific factual context (FLRA App. 2a). The Authority noted that, to the extent that arbitrability questions may arise in the future, EEOC could file exceptions to specific arbitration awards as provided in Section 7121 of the Statute (*ibid.*).

C. The Decision And Order Of The Court Of Appeals

In an opinion by Judge Tamm, the court of appeals (Senior Judge MacKinnon, dissenting) upheld the Authority's decision and enforced the Authority's order (Pet. App. 1a-37a). The court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), stated at the outset that "the Authority is entitled to 'considerable deference' when

interpreting and applying the [Statute's] provisions to specific situations" (Pet. App. 7a; see also Pet. App. 7a n.11).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations and that any bargaining proposal regarding contracting-out would restrict that authority (Pet. App. 8a-11a). The court found that the Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" (Pet. App. 8a). Since the bargaining proposal essentially echoed the statutory requirement that contracting-out determinations be made in accordance with applicable laws, the court agreed with the Authority's conclusion that the proposal, which did not itself establish any substantive criteria guiding management's contracting-out determinations, did not affect the scope of that authority reserved to management by the Statute (Pet. App. 9a).

Second, the court rejected EEOC's argument that adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure (Pet. App. 11a-16a). The court noted that this argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal (Pet. App. 11a-12a). Such an assumption, the court found, was "contrary to the text" of the Statute, which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" (Pet. App. 12a). In this regard, the court noted that under the Statute, "[o]nly five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism" (Pet. App. 12a; footnote omitted).[6]

Finally, the court rejected EEOC's argument that the language of the Circular (that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself) renders the proposal nonnegotiable (Pet. App. 16a-17a).

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[6] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of matters grievable (Pet. App. 14a-15a). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement." (Pet. App. 15a, citing 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924.)

First, the court noted that the proposal is not inconsistent with the Circular because the proposal does not "create" a new appeal right (Pet. App. 16a). Rather, as the court had already determined, the right to file grievances regarding contracting-out decisions is created by the Statute, not by the proposal (*ibid.*). Second, and "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (*ibid.*). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress." (Pet. App. 16a-17a, quoting *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949).)

The court of appeals denied EEOC's petition for rehearing and its suggestion for rehearing en banc (Pet. App. 38a-39a).

SUMMARY OF ARGUMENT

Construing the duty to bargain under the Federal Service Labor-Management Relations Statute is a "task[ ] lying at the heart of the [Authority's] function." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). In this case, the Authority determined that a bargaining proposal which simply restates EEOC's obligation to do that which it must do in any event—make contracting-out determinations in compliance with OMB Circular No. A-76 and other applicable laws and regulations—is within the statutory duty to bargain. The hallmark of the Authority's decision is consistency—consistency with the literal terms of the Statute, consistency with congressional intent as evinced in the Statute and its legislative history, consistency with traditional principles of labor law, and consistency with Authority decisional precedent on what is and is not within the duty to bargain in the federal sector. The Authority's decision, enforced by the court of appeals below, warrants affirmance by this Court.

A. The Statute reserves to management the nonnegotiable substantive authority, subject to 5 U.S.C. 7106(b)(2) and (3) and "in accordance with applicable laws," to make determinations with respect to contracting-out. Thus, management's contracting-out authority is not boundless. That authority is "subject to" the negotiation of procedures which management will observe

in exercising its right to contract-out and the negotiation of appropriate arrangements for employees adversely affected by the exercise of the right. Further, that authority must be exercised in accordance with any existing laws and regulations that govern the exercise of that authority. Consequently, a bargaining proposal is not nonnegotiable simply because it mentions a subject matter that is a management right. Instead, an inquiry must be made to determine what impact, if any, the proposal would have on management's exercise of its reserved authority. 5 U.S.C. 7106(a).

In making such an inquiry, the Authority has distinguished between proposals that only reiterate management's obligation to act in accordance with applicable legal requirements and proposals that add restrictions to management's exercise of its authority. Bargaining proposals that do no more than restate management's obligation to adhere to whatever legal and regulatory requirements may be extant at the time management exercises its Section 7106(a)(2) rights are within the duty to bargain. On the other hand, proposals that would impose substantive limitations of their own making on the exercise of management rights are not within the duty to bargain. The Authority has consistently applied this distinction in resolving disputes about the negotiability of proposals that address contracting-out as well as other rights covered in Section 7106(a)(2) of the Statute.

The Authority properly applied these principles to the proposal in this case, which simply restates EEOC's obligation to comply with applicable laws and regulations when it exercises its authority to contract-out. The proposal therefore reserves to EEOC the full range of discretion available to it under law, which is precisely the same range of discretion reserved to EEOC under the Statute. Thus, as found by the Authority and as affirmed by the court of appeals, any limitations on EEOC's contracting-out authority stem not from the proposal but from external legal requirements with which EEOC is obligated to comply in any event. Because the proposal in this case does not impose any substantive limitation on EEOC, it is within the duty to bargain.

B.1. Congress mandated that every collective bargaining agreement under the Statute contain a negotiated grievance procedure which includes binding arbitration. 5 U.S.C. 7121(a). The term "grievance" is broadly defined to include, among other things, any complaint by any employee concerning "any matter relating

to the employment of the employee" (5 U.S.C. 7103(a)(9)(A)) or "any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)).

Petitioner's argument that the proposal would improperly bring contracting-out decisions within the scope of the negotiated grievance procedure does not square with the terms of the Statute. Unless the parties in negotiations agree otherwise, Congress prescribed those matters which are to be submitted as a matter of law to the negotiated grievance procedure. 5 U.S.C. 7121 and 7103(a)(9); H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). Congress exempted by law only five subject-matters from the permissible scope of the negotiated grievance procedure; contracting-out was not one of the five exempted. 5 U.S.C. 7121(c); H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978). Thus, even in the absence of the proposal, disputes over contracting-out are within the permissible scope of the negotiated grievance procedure unless the parties decide to exclude them.

Nonetheless, EEOC argues that by designating a subject as a management right, Congress intended not only to take that subject outside the duty to bargain but to remove it from the scope of the negotiated grievance procedure as well. But as is evident from EEOC's acknowledgment that grievances over discipline and promotions are permissible, even though discipline and promotions are management rights, the management rights provision of the Statute does not also operate to remove the specified rights from the scope of the negotiated grievance procedure. The legislative history demonstrates that Congress intended the management rights provision only to preclude bargaining, and then only with respect to proposals which improperly intrude upon the exercise of the right; the management rights provision does not address what matters can or cannot be grieved under the negotiated grievance procedure.

Of course, nothing in the Statute precludes EEOC or any other employing agency from proposing in collective bargaining to exclude contracting-out matters from the scope of the grievance procedure. Indeed, Congress expressly permitted parties to negotiate for the exclusion of any matter from the Statute's broad-scope negotiated grievance procedure. 5 U.S.C. 7121(a)(2); *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640 (D.C. Cir.1983).

2. Petitioner's alternative argument that contracting-out should be exempt from coverage under the Statute's grievance mechanism because it is different in character from other management rights ignores the fact that the Statute makes no such distinction. Further, the legislative history gives no indication that when Congress reserved to management as nonnegotiable the substantive authority to contract-out, it intended contracting-out to be the one Section 7106(a)(2) right over which grievances were to be impermissible.

EEOC also argues that the portion of the bargaining proposal that would permit grievances over violations of the Circular is inappropriate because the Circular is not a rule or regulation, but merely a policy directive which does not limit management's discretion in any meaningful sense. This argument emphasizes the discretionary aspects of the Circular, ignores the mandatory aspects, and disregards the fact, acknowledged by EEOC, that the Circular requires EEOC's compliance. Moreover, insofar as EEOC's argument goes to the nature of the review to be given EEOC's exercise of the discretionary aspects of the Circular, the Authority's precedent clearly demonstrates that arbitrators may not substitute their judgment for the exercise of management discretion in areas reserved to management by Section 7106, including contracting-out.

C. Finally, EEOC errs in asserting that the Circular itself operates to curtail the permissible reach established by Congress for the negotiated grievance procedure. EEOC's argument that Section 7117(a)(1) of the Statute bars negotiation over proposals simply because they happen to share the same subject matter as a government-wide rule or regulation is incorrect because Section 7117(a)(1) only bars negotiation over proposals which would bring about an inconsistency with government-wide rules or regulations like the Circular. EEOC argues in the alternative that there is an inconsistency between the Circular and the proposal and, under Section 7117(a)(1), this inconsistency should bar negotiation over the proposal. However, even assuming that coverage of contracting-out disputes under the negotiated grievance procedure is inconsistent with the terms of the Circular, the Statute's establishment of a right to a broad-scope negotiated grievance procedure can not be restricted by the Circular. To allow the Circular to limit the statutory scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949).

ARGUMENT

A COLLECTIVE BARGAINING PROPOSAL THAT DOES NOT ESTABLISH ANY SUBSTANTIVE LIMITATION ON A FEDERAL AGENCY'S RIGHT, IN ACCORDANCE WITH APPLICABLE LAWS, TO MAKE DETERMINATIONS WITH RESPECT TO CONTRACTING-OUT, BUT INSTEAD SIMPLY RESTATES AN AGENCY'S EXISTING OBLIGATION TO COMPLY WITH REQUIREMENTS IN APPLICABLE LAWS AND REGULATIONS CONCERNING CONTRACTING-OUT, IS WITHIN THE DUTY TO BARGAIN UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

A. The Statute Precludes Bargaining Over Proposals That Would Substantively Limit The Exercise Of Authority Reserved To Management, Not Over A Proposal That Only Restates Management's Undisputed Obligation To Comply With Applicable Laws and Regulations

The duty to bargain in the federal sector extends generally to "conditions of employment," which include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1143 n.2 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). Absent other considerations, bargaining proposals falling within the ambit of this definition are within the duty to bargain. See *AFGE, Local 32 and Office of Personnel Management, Washington, D.C.*, 6 F.L.R.A. 423, 423-424 (1981), enf'd *sub nom. Office of Personnel Management* v. *FLRA*, 706 F.2d 1229 (D.C. Cir. 1983). See also *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1283-1286 (D.C. Cir. 1983); *Department of Defense, Department of the Army* v. *FLRA*, 685 F.2d 641, 644 (D.C. Cir. 1982). The duty to bargain under the Statute does not encompass proposals that are inconsistent with federal law or applicable regulation (5 U.S.C. 7117(a)) or proposals that improperly intrude on the authority of management officials of an agency to exercise the rights enumerated in Section 7106(a) of the Statute

(5 U.S.C. 7106(a)). *Department of Defense* v. *FLRA*, 659 F.2d at 1143 n.3, 1146.[7]

Among the rights the Statute reserves to management is the authority "in accordance with applicable laws • • • to make determinations with respect to contracting-out[.]" 5 U.S.C. 7106(a)(2)(B). This management right was first included in the bill reported out of the House Committee. H.R. 11280, 95th Cong., 2d Sess. § 7106(a)(2)(B) (1978), *reprinted in Legis. Hist.* at 391. The House adopted this as one of the management rights. 124 Cong. Rec. 29176, 29221 (1978), *reprinted in Legis. Hist.* as 911, 966. The Senate bill did not include a management right to contract-out, and in the Conference Committee the Senate receded to its inclusion in the Statute. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978), *reprinted in Legis. Hist.* at 822.[8]

Just as it has held with respect to the other rights listed in Section 7106(a)(2),[9] the Authority has recognized consistently that the Statute reserves to management as nonbargainable the substantive exercise of its authority to make contracting-out determinations. The Authority's first and lead decision in this area

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[7] Proposals concerning certain matters, set forth in Section 7106(b)(1) of the Statute, are negotiable only at the election of the agency. 5 U.S.C. 7106(b)(1). See *New York Council, ACT* v. *FLRA*, 757 F.2d 502, 508 (2d Cir. 1985), cert. denied, No. 85-106 (Oct. 7, 1985).

[8] The right to contract-out was not specifically listed as a separate management right under the Executive Order program. However, in *Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia*, 1 F.L.R.C. 431, 440 (1973), a proposal restricting the factors an agency could rely on in reaching a contracting-out decision, and thus "proscribing management action based on OMB Circular A-76," was found nonnegotiable by the Federal Labor Relations Council ("the Council"). The Council found that the proposal conflicted with management's rights, under Section 12(b)(5) of Executive Order 11491, to determine the methods, means, and personnel by which agency operations were to be conducted. 1 F.L.R.C. at 440-441. However, the Council's decision also stated that "proposals to establish procedures which management would observe leading to the exercise of the retained management rights under 12(b)(5) would be negotiable to the extent they do not interfere with the exercise of the rights themselves." 1 F.L.R.C. at 442.

[9] With respect to the right to hire, see *NTEU and IRS*, 2 F.L.R.A. 281 (1979); the right to assign work and direct employees, see *NTEU and Department of the Treasury, Bureau of the Public Debt*, 3 F.L.R.A. 769 (1980), aff'd *sub nom. NTEU* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982); the right to layoff employees, see *NTEU and IRS*, 7 F.L.R.A. 275, 286-288 (1981); the right to

is *NFFE, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd *sub nom. NFFE, Local 1167 v. FLRA*, 681 F.2d 886 (D.C. Cir. 1982). Since then, the Authority consistently has found nonnegotiable proposals which would impose substantive limitations on the exercise of management's contracting-out authority. *E.g., AFGE, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan*, 14 F.L.R.A. 302 (1984) (proposals 1 and 2); *IAM and AW, Local 2424 and Department of the Army, Aberdeen Proving Ground, Maryland*, 8 F.L.R.A. 679 (1982) (proposals 3 and 4); *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669 (1981) (proposal 3).[10] However, as the Authority correctly found and the court of appeals properly affirmed, the Statute does not automatically render nonnegotiable *all* proposals regarding contracting-out, and management's discretion in this area is not unfettered (Pet. App. 8a).

First, management must make its contracting-out determinations in accordance with any existing laws and regulations that govern the exercise of such authority. This proposition is not

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discipline employees, see *PATCO and FAA*, 5 F.L.R.A. 763 (1981); the right to assign work, see *NTEU and Department of the Treasury, IRS*, 6 F.L.R.A. 508, 517-518 (1981); the right to determine the personnel by which agency operations shall be conducted, see *NFFE, Locals 1707, 1737 and 1708 and Headquarters, Louisiana Air and Army National Guard, New Orleans, Louisiana*, 9 F.L.R.A. 148 (1982); the right to make selections for appointments, see *Immigration and Naturalization Service, Eastern Regional Office (Burlington, Vermont)*, 18 F.L.R.A. No. 103 (1985) slip op. 8; and the right to take whatever actions may be necessary to carry out the agency mission during emergencies, see *ACT, Inc., Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania*, 7 F.L.R.A. 346, 348-350 (1981).

[10] See also *AFGE, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California*, 19 F.L.R.A. No. 118 (1985) (provision 2); *AFGE, Local 12 and Department of Labor*, 18 F.L.R.A. No. 58 (1985) (proposal 6); *AFGE, Local 1923 and Health Care Financing Administration, Baltimore, Maryland*, 17 F.L.R.A. No. 96 (1985); *AFGE, Local 1622 and The Directorate Facilities and Engineering Department of the Army, Fort George G. Meade, Maryland*, 17 F.L.R.A. No. 69 (1985).

merely self-evident.[11] The plain language of the Statute states that management is reserved the authority "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).[12]

Second, Section 7106(a) of the Statute makes this management authority "[s]ubject to" Section 7106(b)(2) and (3), which provides for the negotiation of procedures which management will observe in exercising its right to contract-out and "appropriate arrangements" for employees adversely affected by the exercise of the right. 5 U.S.C. 7106(b)(2) and (b)(3). See, *e.g.*, *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1185 (D.C. Cir. 1983); *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 892 (D.C. Cir. 1982); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1146 and n.28, 1151, 1153 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). See also *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985) slip op. 15; *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983).

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[11] Under general labor law principles, the designation of a matter as a reserved management right does not exempt management's exercise of that right from restrictions imposed by applicable law and regulations. See, *e.g.*, Prasow & Peters, *Arbitration and Collective Bargaining* 31 (1970) ("Stated in an unqualified simplistic form, the reserved-rights theory holds that management's authority is supreme * * * in all areas except those where its authority is restricted by law." [footnote omitted]); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: the Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803, 814 (1971) ("The 'management rights doctrine' is a valid rule of construction which holds that management is presumed to retain its unfettered common law right to run its business except as abridged by contract or statute."); Phelps, "Management's Reserved Rights: An Industry View," in *Proceedings of Ninth Annual Meeting of National Academy of Arbitrators*, 102, 105 (1956) ("In the absence of [a collective bargaining agreement narrowing management's reserved rights], management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law.").

[12] See Elkouri and Elkouri, *Legal Status of Federal-Sector Arbitration*, supp. to *How Arbitration Works*, 3d ed., 13 (1980) ("The statutory words 'in accordance with applicable laws' do limit management rights, and this limitation would appear to be properly enforceable by contractual grievance and arbitration procedures. Apart from this, however, the statutory reservation of management rights necessarily reduces the scope of grievance-procedure or arbitral authority to disturb actions taken by agency management officials.").

Consequently, the fact that a bargaining proposal mentions a management right enumerated in Section 7106(a)(2), including the right to contract-out, does not of itself render the proposal nonnegotiable.[13] In order to determine whether such a proposal is within the statutory duty to bargain, the Authority examines the proposal to ascertain what effect, if any, it would have on management's exercise of its reserved authority. The Authority makes that examination based on the language of the proposal and the submissions of the parties. 5 U.S.C. 7117(c); 5 C.F.R. 2424.4-2424.7. See *Department of Treasury* v. *FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983); *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891.

The proposal in this case states: "The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out" (Pet. App.

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[13] With respect to the interpretation to be given the management rights provision in the Statute, the House Committee Report stated:

> The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program, but to preserve the essential prerogatives and flexibility Federal managers must have. The "management rights" language of Executive Order 11491 has been a substantial barrier against negotiations. The committee intends that section 7106—which retains several of management's rights under the Executive Order, but also eliminates several—be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.

H.R. Rep. 95-1403, 95th Cong., 2d Sess. 43-44 (1978), *reprinted in Legis. Hist.* at 689-690.

As Representative Ford stated:

> It is our expectation and that of others supporting the substitute's management rights clause that such a clause will adequately protect genuine managerial prerogatives but that, construed strictly, such a clause will also allow the flexibility that is the hallmark of a successful labor-management program. Thus, although management has the right to direct the workforce, proposals aimed at lessening the adverse impact on employees of an exercise, perhaps arbitrary, of that right are fully negotiable.

124 Cong. Rec. 29199 (1978), *reprinted in Legis. Hist.* at 956. See also 124 Cong. Rec. 29187 (1978) (statement of Rep. Clay), *reprinted in Legis. Hist.* at 933.

40a).[14] As the Authority found, and the court below affirmed, this proposal does not establish any substantive criteria guiding EEOC's contracting-out determinations (Pet. App. 41a, 9a). Instead, the proposal echoes the existing statutory requirement that EEOC make its contracting-out determinations in accordance with applicable laws. Accordingly, any restrictions on EEOC's contracting-out authority stem not from the proposal but from external legal limitations with which EEOC is obligated to comply in any event.

The Authority has consistently held to be within the duty to bargain proposals which, like the one here involved, simply restate management's obligation to exercise its Section 7106(a)(2) rights in accordance with applicable laws and regulation. Thus, for example, the Authority has held negotiable a proposal that "[a]ll reductions in force will be carried out in strict compliance with applicable laws and regulations" (*AFGE Local 1692 and Department of the Air Force, Mather Air Force Base, California*, 8 F.L.R.A. 194 (1982) (provision 2)); a proposal which provided that work assignments not violate any relevant law, rule or regulations (*NFFE, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado*, 9 F.L.R.A. 151 (1982) (union proposal 2)); and a proposal stating that involuntary job reassignments would only be made to promote the efficiency of the service and not to discriminate or punish, or for any reason that would violate law, rule, regulation or agreement (*AFGE, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service*, 11 F.L.R.A. 672

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[14]The issue resolved by the Authority and litigated in the court below is whether EEOC is obligated to bargain over the proposal. Heretofore, EEOC has never suggested that it is not obligated to comply with the Circular. See EEOC's petition for rehearing to the court below, at 8: "[T]he EEOC does not dispute that it must comply with the terms of the Circular • • • ." The extent and the nature of the compliance obligation imposed by the Circular, a matter now raised by EEOC (Pet. Br. 24-29), was not an issue before the Authority and is not an issue that this Court must resolve in determining whether the Authority properly decided that the proposal is within the duty to bargain. In any event, those portions of the Circular which contain only guidance would not be subject to arbitral review. See discussion at 37 *infra*.

(1983) (union proposal 4)).[15] In each of these cases, the proposals were properly found negotiable because they did not establish any substantive limitation on the exercise of a management right.

On the other hand, the Authority has just as consistently found nonnegotiable proposals which impose substantive limitations of their own making on the exercise of management rights, even though those limitations may arguably appear benign. Thus, the Authority has found nonnegotiable a proposal that would have required contracting-out determinations to be "fair, equitable, and in accordance with established policy" because an arbitrator would not simply monitor compliance with mandatory portions of applicable laws and regulations but would instead substitute his or her judgment for that of the agency in areas reserved to management discretion. *AFGE, Local 3403 and National Science Foundation*, 6 F.L.R.A. at 673-675.[16] Similarly, the Authority has found proposed contract language nonnegotiable,

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[15] See also *AFGE, Local 1940 and Department of Agriculture, Plum Island Disease Center*, 16 F.L.R.A. No. 114 (1984) slip op. 5 n.6 (proposals limited to requiring that performance standards be established in accordance with applicable laws would be within the duty to bargain); *Delaware Army and Air National Guard*, 16 F.L.R.A. No. 66 (1984) (proposal 6) (proposal that management fill bargaining unit positions consistent with law is negotiable); *AFGE, Local 1858 and Army Missile and Munitions Center and School, Redstone Arsenal, Alabama*, 15 F.L.R.A. No. 59 (1985) (proposal that the ratio of civilian and military positions will be in accordance with agency regulation is negotiable); *ACT, New York State Council and State of New York, Division of Military and Naval Affairs, Albany, New York*, 11 F.L.R.A. 475 (1983) (proposal 1) (proposal that management act in accordance with merit system principles in 5 U.S.C. 2301 is negotiable); *IAM and AW, Local 2424 and Department of the Army, Aberdeen Proving Ground, Maryland*, 8 F.L.R.A. 679 (1982) (proposals 5 and 6) (proposals that management will minimize the adverse effect of contracting-out decisions in accordance with applicable laws are negotiable); *NTEU and IRS*, 3 F.L.R.A. 693 (1980) (proposals 2 and 3) (proposals that management act in accordance with merit system principles in 5 U.S.C. 2301 are negotiable).

[16] See also *NTEU, Chapter 204 and Federal Election Commission*, 19 F.L.R.A. No. 25 (1985) (proposal would have subjected management's determination as to which days employees should work to a test of "reasonableness"); *AFGE, Local 32 and Office of Personnel Management*, 16 F.L.R.A. No. 127 (1985) (proposal 3) (proposal requiring performance standards to be "fair and equitable" would have improperly permitted arbitrators to substitute their judgment as to the proper content of performance standards), petition for review filed *sub nom. Local 32, AFGE* v. *FLRA*, No. 85-1038 (D.C. Cir. Jan. 16, 1985).

even though it tracked the current language of the Circular, because it would require management to comply with that language "regardless of whether OMB subsequently revised or eliminated the directives/circulars from which they were taken." *NFFE, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida,* 6 F.L.R.A. 574, 577 (1981), aff'd as to other matters *sub nom., NFFE v. Local 1167 FLRA,* 681 F.2d 886 (D.C. Cir. 1982).[17]

In determining that the proposal in this case is negotiable, the Authority properly applied the principle developed in the above cases involving contracting-out as well as other management rights in Section 7106(a)(2) of the Statute. Simply put, proposals which do no more than restate the obligation to adhere to whatever legal and regulatory requirements may be extant at the time are within the duty to bargain, but those proposals which impose their own criteria affecting the substantive exercise of management's reserved rights are nonnegotiable. In applying this distinction to negotiability determinations that Congress entrusted to be the primary function and responsibility of the Authority, the Authority has performed "its 'special function of applying the general provisions of [the Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA,* 464 U.S. 89, 97 (1983) (citation omitted). See also *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 496-497 (1979). The Authority's decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," and this accommodation should not be disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron, U.S.A., Inc.* v. *National Resources Defense Council, Inc.,* Nos. 82-1005, 82-1247 and 82-1591 (June 25, 1984) slip op. 6-7, *quoting United States* v. *Shimer,* 367 U.S. 374, 382, 383 (1961). The consistency of the Authority's decisional precedent in this negotiability area is a further reason that the Court should be particularly reluctant to hold that the Authority's interpretation of the Statute is impermissible. See *Pattern Makers' League of North America* v. *NLRB,* No. 83-1894 (June 27, 1985) slip op. 19-20.

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[17] See also cases cited in notes 9, 10, *supra.*

B. The Statute Does Not Exempt From The Scope Of The Negotiated Grievance Procedure Matters Relating To The Exercise Of Management's Contracting-Out Authority In Accordance With Applicable Legal Requirements

EEOC argues (Pet. Br. 17-22, 35-42) that even if the language of the proposal does not limit EEOC's authority to make contracting-out determinations, the effect of the proposal would be to hinder its exercise by subjecting such decisions to the negotiated grievance procedure mandated by Congress in Section 7121 of the Statute. However, EEOC's argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable legal requirements would not be grievable in the absence of the contract proposal. As the Authority properly found and the court below correctly affirmed, this assumption is contrary to the text and history of the Statute.

1. As stated in the House Committee Report, Congress enacted the Statute to "improve the civil service system, ensure adequate protection for employees against unlawful abuse by agency management, and provide a framework for labor-management relations in the Federal Government." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 3 (1978), *reprinted in Legis. Hist.* at 679. In furtherance of these goals, Congress required that every collective bargaining agreement contain a negotiated grievance procedure which includes binding arbitration. 5 U.S.C. 7121. The Statute "prescribes those matters which * * * have to be submitted, as a matter of law, to the grievance procedures * * * unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978), *reprinted in Legis. Hist.* at 825.

This Court has recognized that Section 7103(a)(9) of the Statute "broadly defines 'grievance'." *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985) slip op. 15. The term grievance includes, among other things, any complaint by any employee concerning "any matter relating to the employment of the employee" (Section 7103(a)(9)(A)), or "any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment * * * " (Section 7103(a)(9)(C)(ii)). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 641.

"[A]lthough this subsection [7103(a)(9)] is virtually all-inclusive in defining 'grievance,' section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in Legis. Hist.* at 686. See note 4, *supra*. See also *Andrade* v. *Lauer*, 729 F.2d 1475, 1487 n.22 (D.C. Cir. 1984) ("Congress demonstrated its care in defining the scope of the negotiated grievance procedures by defining several types of claims that it intended to keep outside the scope of the grievance procedure. *See* 5 U.S.C. §7121(c) (1982)."). As the court below correctly noted, contracting-out was not one of the five subjects Congress chose in Section 7121(c) of the Statute to exclude from coverage under the grievance mechanism (Pet. App. 12a). Thus, the language and the legislative history of the Statute constitute a "clear expression of congressional intent" with regard to the permissible scope of the negotiated grievance procedure under the Statute. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 99.

Despite the fact that Congress did not list contracting-out in Section 7121(c) as a subject excluded from the scope of the grievance procedure, EEOC nonetheless contends (Pet. Br. 35-42) that disputes concerning its compliance with applicable contracting-out requirements are not grievable or arbitrable. Indeed, EEOC's principle argument throughout this case has been that when the Statute designates a subject as a management right, the negotiated grievance procedure is not available to resolve disputes over whether management exercised that right within legal and regulatory requirements. Yet apparently even EEOC does not apply this proposition to all management rights since it accepts (see Pet. Br. 29-31) as appropriate grievances over such management rights as the right to discipline or the right to select for employment vacancies (which includes the right to promote employees).

The Statute's reservation of authority to management by operation of Section 7106(a) does not also thereby operate to remove complaints regarding allegedly improper exercise of that authority from the permissible scope of the negotiated grievance procedure. For example, the right to grieve management's compliance with applicable reduction-in-force rules and regulations under the negotiated grievance procedure is unquestioned, even though the authority to layoff employees is made nonnegotiable by

Section 7106(a)(2). See *Andrade* v. *Lauer*, 729 F.2d at 1484-1489 (D.C. Cir. 1984). Also, the right to grieve disciplinary actions under the negotiated grievance procedure is unchallenged, even though the right to take such actions is a nonnegotiable management right. 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924 and cited at Pet. App. 14a-15a. See also *Cornelius* v. *Nutt*, *supra*, slip op. 3.[18] Similarly, the right to grieve noncompliance with proper selection procedures under the negotiated grievance procedure is statutorily permissible, again by operation of Section 7103(a)(9)'s definition of grievance, even though the right to make selections for employee positions is nonnegotiable under Section 7106(a)(2)(C). *E.g.*, *AFGE, Local 12 and U.S. Department of Labor*, 15 F.L.R.A. No. 113 (1984); *Veterans Administration Hospital and AFGE, Lodge 2201*, 4 F.L.R.A. 419 (1980). Thus, Congress' decision to remove a matter from the duty to bargain cannot be equated with an intent to remove that matter from the scope of the negotiated grievance procedure as well.

Nevertheless, EEOC argues (Pet. Br. 38, 41 and n.22) that by using the language "nothing in this chapter shall affect" management's rights, Congress intended that Section 7106(a)(2) rights would be immune from application of the negotiated grievance procedure mandated by Section 7121 of the Statute. This argument improperly reads the phrase "nothing in this chapter" in isolation from the Statute's legislative history as well as from the remainder of Section 7106.[19]

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[18] Section 7121(c)(3) of the Statute sets forth an exception to the general right to grieve discipline. 5 U.S.C. 7121(c)(3). There, Congress exempted from the scope of the negotiated grievance procedure grievances concerning an employee's suspension or removal taken for national security reasons. This exemption demonstrates congressional awareness that the Statute's removal of a subject from the bargaining table did not also operate to remove complaints about the impermissible exercise of the subject from the grievance procedure. The authority to take discipline is reserved to management as nonnegotiable by Section 7106(a)(2)(A); yet, when Congress intended to remove an aspect of that nonnegotiable subject from the grievance procedure, it did so by writing an exemption in Section 7121(c)(3) from the grievance procedure. Congress could have done likewise for contracting-out matters, but did not.

[19] As stated by this Court in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956), "If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy.'" (Citation omitted.)

The Statute's legislative history contradicts EEOC's assertion (Pet. Br. 38, 41) that the language "nothing in this chapter shall affect" was intended to do more than make the exercise of the listed rights nonnegotiable. The quoted language comes from the management rights provision of the bill reported out of the House Committee.[20] In discussing this provision, the House Committee Report stated that "[t]he effect of this section is to place limits on the number of subjects *about which agency management may bargain* with a labor organization."[21] See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92 ("The [Statute] excludes certain management prerogatives from the scope of negotiations, although an agency must bargain over the procedures by which these management rights are exercised. See §7106.").

Although several other management rights were added to Section 7106 of the House bill on the floor immediately prior to passage, the intent of the House remained unchanged; that is, that the management rights section preclude the parties only from bargaining over the exercise of the listed rights. See 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924. As stated by Representative Udall, who introduced this floor amendment expanding the number of management rights, the management rights section was "still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." *Ibid.* Further, Representative Udall stated: "[This amendment] preserves management's right to make the final decisions in these additional areas *in accordance with applicable laws, including other provisions of chapter 71 of title 5*. For example, management has the reserved right to make the final decision to 'remove' an employee, but that decision * * * would in no way affect the employee's right to appeal the decision through * * * the procedures set forth in a collective bargaining agreement."

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[20] H.R. 11280, 95th Cong., 2d Sess. § 7106(a) (1978) *reprinted in Legis. Hist.* at 391-392. The Senate bill paralleled the Executive Order language. S. 2640, 95th Cong., 2d Sess. §§ 7215(c), 7218(a) (1978), *reprinted in Legis. Hist.* at 578, 588-590.

[21] H.R. Rep. 95-1403, 95th Cong. 2d Sess. 43 (1978), *reprinted in Legis. Hist.* at 689 (emphasis added). This version of the House bill contained management's right "in accordance with applicable laws * * * to make determinations with respect to contracting out." See also note 13, *supra*.

Ibid., emphasis added.[22] The House-Senate Conference Committee adopted the House version of Section 7106—the version introduced by Representative Udall.[23]

Nothing in the pertinent legislative history demonstrates that Congress intended the management rights clause to take matters outside the grievance procedure in addition to making them nonnegotiable. Accordingly, EEOC's assertion that when the Statute designates a topic as a management right it not only removes the exercise of that right from collective bargaining but also removes grievances concerning that subject-matter from coverage under the negotiated grievance procedure is without merit.[24]

Moreover, EEOC's reliance on the phrase "nothing in this chapter shall affect" improperly reads the phrase in isolation from the other relevant statutory language. In its entirety, the contracting-out right in section 7106(a)(2)(B) of the Statute provides: "Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency • • • in accordance with applicable laws • • • to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). As discussed at 15-16, *supra*, this language does not provide for an unfettered exercise of management authority. The Statute makes management's exercise subject to subsection (b), which in Section 7106(b)(2) and (b)(3) imposes the affirmative obligation to negotiate procedures which management will observe in exercising its right and "appropriate arrangements" for

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[22] Read in context, Representative Udall's statement that "unions do not get much out of [the Statute] that is not already in the Executive order [.]" 124 Cong. Rec. 29182 (1978) (cited at Pet. Br. 33), refers to such matters as the right to strike, agency shop, and bargaining over wages, fringe benefits and retirement which were not included in the new law. 124 Cong. Rec. 29182, 29185 (1978), *reprinted in Legis. Hist.* at 923, 929. With regard to the matters relevant to this case, Representative Udall's statement in the text above is clear and specific. Moreover, with respect to what unions did gain, Representative Udall cited "guarantees about procedures that management must follow" and a broader scope of matters that can be arbitrated. 124 Cong. Rec. 29182 (1978), *reprinted in Legis. Hist.* at 923. See also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 103 n.13.

[23] H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 153-154 (1978), *reprinted in Legis. Hist.* at 821-822. See *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1156 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

[24] Moreover, as discussed at 22, *supra*, when Congress intended to remove from the grievance procedure an aspect of a management right, it created a specific exemption from the scope of the grievance procedure. See 5 U.S.C. 7121(c)(3).

employees adversely affected by the exercise of the right. See *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183 (D.C. Cir. 1983); *Department of the Air Force, United States Air Force Academy* v. *FLRA*, 717 F.2d 1314 (10th Cir. 1983). The Statute, by its express terms, also makes management's exercise subject to the obligation that it be done "in accordance with applicable laws."[25]

As Authority case law discussed above at 19 demonstrates, exercise of management discretion within the bounds of applicable law and regulation is not subject to review through the negotiated grievance procedure. Bargaining proposals that would invite arbitral encroachment on the exercise of discretion reserved to management consistently have been held nonnegotiable by the Authority. See cases cited at 19-20, *supra*. For example, the Authority has held that management's nonnegotiable authority to set employee performance standards means that no grievance procedure can be negotiated which would permit arbitral review of

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[25] Petitioner contends (Pet. Br. 20-21) that subjecting determinations regarding contracting-out to the grievance and arbitration mechanism will result in delay and added expense in the contracting-out process. As to the arbitrators' awards cited at Pet. Br. 20 n.9, no such expense has been incurred. In each case, the Authority has granted the agency's request for a stay of the award pending the Authority's resolution of the exceptions filed by the agency pursuant to 5 U.S.C. 7122. (Copies of the stay orders have been lodged with the Clerk of the Court and provided to counsel for the other parties.) Further, as to the time involved in the grievance and arbitration process, the Statute requires a negotiated grievance procedure to "provide for expeditious processing" (5 U.S.C. 7121(b)(2)); the parties may, of course, consistent with that requirement, negotiate applicable time limits for grievance and arbitration processing that meet their needs with respect to contracting-out or any other matters. In addition, parties may bargain to exclude matters from the scope of the negotiated grievance procedure. 5 U.S.C. 7121(a)(2).

In essence, EEOC's argument sets forth considerations that an agency might advance if it were to propose to negotiate an exclusion for contracting-out matters from the scope of the grievance procedure, or to suggest that Congress should exempt such matters by law. But even assuming the validity of such considerations, Congress chose not to add such a sixth exemption to the five exemptions enumerated in Section 7121(c) of the Statute. Instead, while Congress made contracting-out a management right, just as it made the right to take disciplinary action a management right, it exempted neither matter from permissible coverage by a negotiated grievance procedure. See *Gray* v. *Office of Personnel Management*, 771 F.2d 1504, 1511 (D.C. Cir. 1985) ("We can not and will not * * * add a statutory provision which the First Branch did not include.").

the establishment of the performance standards, as that would invite arbitrators to substitute their judgment for that of the agency in the exercise of the discretion reserved to the agency as nonnegotiable. *AFGE, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corp., Massena, New York*, 5 F.L.R.A. 70, 77-82 (1981), aff'd *sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). See also *NTEU* v. *FLRA*, 767 F.2d 1315, 1317-1318 (9th Cir. 1985).

Petitioner's contention (Pet. Br. 39 n.20) that the *AFGE, Local 1968* case, and the other cases cited at Pet. Br. 29, require a different result from the one herein ignores the critical distinction which Authority precedent consistently preserves. Whether it be in the area of contracting-out or employee performance standards, the Authority consistently has ruled that management retains the nonnegotiable prerogative to choose the criteria which govern the exercise of its rights. See, *e.g.*, *AFGE, Local 1923 and Health Care Financing Administration, Baltimore, Maryland*, 17 F.L.R.A. No. 96 (1985) (contracting-out); *Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2*, 20 F.L.R.A. No. 39 (1985) (performance standards). Not only has the Authority held nonnegotiable proposals which would allow arbitrators to substitute their judgment for that of management in the exercise of its right (see, *e.g.*, *AFGE, Local 3403 and National Science Foundation*, 6 F.L.R.A. at 673-675), but it has also granted management's exceptions to arbitral awards that would have given effect to a contract provision that infringed on the full scope of management authority. See *PATCO and FAA*, 5 F.L.R.A. 763 (1981) (contract provision granting immunity from discipline if employee properly reported air traffic incident; Authority modified award to retain to management its authority to discipline). Thus, even if a proposal were negotiated and then implemented by an arbitral award in a way that infringed on the exercise of the

discretion reserved to management by one of the management rights, the Statute ensures management the opportunity to secure appropriate relief from that award.[26]

On the other hand, the express terms of the Statute itself provide that the negotiated grievance procedure can address matters relating to the exercise of management's authority in accordance with applicable legal requirements, as that exercise relates to conditions of employment. 5 U.S.C. 7121 and 7103(a)(9). Bargaining proposals, like the one in this case, that do no more than restate this operative effect of the Statute are negotiable.

Congress did not remove the subject matter of contracting-out from the Statute's broad-scope negotiated grievance procedure. However, nothing in the Statute precludes EEOC or any other employing agency from proposing in collective bargaining to exclude contracting-out matters from the scope of the grievance procedure. Indeed, Congress authorized parties, as part of the collective bargaining process, to agree to exclude matters from the grievance procedure in addition to the five matters excluded by 5 U.S.C. 7121(c). 5 U.S.C. 7121(a)(2); *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 649. In doing so, Congress created a broad-scope grievance procedure as a starting point for parties to the collective bargaining process. If both parties do nothing to change it, the broad-scope procedure applies; if either party desires to add exclusions to the grievance procedure, the matter is subject to mandatory negotiations. *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 649.[27] Accordingly, through the collective bargaining process established by Congress, EEOC can seek to exclude matters related to contracting-out from

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[26] 5 U.S.C. 7122. See, *e.g.*, *U.S. Department of Justice, Immigration and Naturalization Service, Western Regional Office, San Pedro, California and AFGE, Local 2805*, 18 F.L.R.A. No. 20 (1985) (provision in parties' contract that assignment of training be equitable cannot be enforced because it interferes with agency's right to assign work under Section 7106(a)(2)(B)); *NTEU and U.S. Customs Service*, 17 F.L.R.A. No. 12 (1985) (provision in parties' contract that performance standards be "reasonable for each position" cannot be enforced because it interferes with agency's rights under Section 7106(a)(2)(A) and (B) to direct employees and assign work); *U.S. Department of Justice, Federal Prison System and AFGE, Local 1741*, 15 F.L.R.A. No. 178 (1984) (arbitral award vacating an employee's assignment and conditioning reassignment on a 60-day trial period must be set aside because it interferes with agency's right under Section 7106(a)(2)(A) to assign employees).

[27] For example, parties in the federal sector have excluded from the scope of the negotiated grievance procedure such matters as decisions on incentive

the grievance procedure. And, as the D.C. Circuit has noted, "[i]n collective bargaining, government managers are presumably competent to look out for government interests." *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

In sum, as properly determined by the Authority and affirmed by the court of appeals, the proposal's effect of allowing matters concerning EEOC's adherence to applicable laws and regulations concerning contracting-out to be raised under the negotiated grievance procedure would not add a restriction to management's contracting-out authority because those matters would be grievable in any event by operation of the Statute, absent an exclusion negotiated by the parties.

2. EEOC advances two alternative arguments in support of its view that the scope of the negotiated grievance procedure cannot encompass questions as to whether EEOC exercised its contracting-out authority in accordance with applicable laws, rules, and regulations. Neither argument withstands analysis.

a. EEOC first contends (Pet. Br. 29-34) that even if by making contracting-out a management right Congress did not automatically remove that matter from the scope of the negotiated grievance procedure, contracting-out should be removed because it is different in character from other management rights over whose exercise grievances are permitted. EEOC argues (Pet. Br. 32) that contracting-out determinations bear only indirectly on the employer-employee relationship and that Congress intended arbitrators to resolve only disputes over subjects that are central to any system of labor management relations, such as discipline and promotions (Pet. Br. 31).[28]

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awards (*AFGE Local 547 and Tampa Veterans Administration Hospital*, 19 F.L.R.A. No. 87 (1985)) and matters for which a statutory appeals procedure exists (*U.S. Department of Housing and Urban Development and AFGE*, 12 F.L.R.A. 41 (1983)).

[28] EEOC argues (Pet. Br. 31-32) that this distinction was made under the pre-Statute program, citing two cases decided by the Federal Labor Relations Council. However, it is not clear that the Council fashioned such a distinction. See *AFGE, Local 2017 and Department of the Army, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia*, 5 F.L.R.C. 435, 437 (1977) (grievance concerning the assignment of military personnel to bargaining unit work). In any event, the plain language of the Statute and its legislative history constitute "clear expression of congressional intent" with regard to the permissible scope of the negotiated grievance procedure under the Statute. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 99.

EEOC's attempted distinction between those management rights over which grievances are permissible and others over which grievances should be impermissible is not based on the language of the Statute and is not supported by the Statute's legislative history. Not only is this argument raised late in the development of this case,[29] it is advanced late in the development of the law of labor arbitration which has long recognized that "[c]ontracting-out work is the basis of many grievances; and that type of claim is grist in the mills of arbitrators." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960) (footnote omitted).

Management's nonnegotiable authority to make determinations with respect to contracting-out is set forth in the Statute along with such other rights as the authority to hire, direct, discipline and layoff employees, assign work, and select for employee vacancies. See 5 U.S.C. 7106(a)(2). In each case, management's authority is subject to the same affirmative obligation imposed by Section 7106(b)(2) and (b)(3) of the Statute. Further, in each case, management's authority is subject to the same obligation that it be exercised "in accordance with applicable laws." 5 U.S.C. 7106(a)(2). EEOC acknowledges (Pet. Br. 31) that the language of the Statute permits the negotiated grievance procedure to handle grievances over discipline and promotions. EEOC points to no language of the Statute which would make this result any different for the similarly situated right to make determinations with respect to contracting-out.

Nor does the Statute's legislative history provide any basis for concluding that alleged violations of law, rule, or regulation affecting conditions of employment are grievable when they concern some management rights but not others. EEOC's argument (Pet. Br. 32 n.15) that Congress "implicitly recognized" distinctions between the management rights, making some grievable and others not, rests entirely on the contention that because some rights were added on the House floor, whereas others were included in the House Committee bill, the rights added on the House floor were grievable while the others were not. Certainly

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[29] EEOC's argument was not raised before the Authority or the court of appeals, and therefore is not properly before the Court. 5 U.S.C. 7123(c). See, *e.g.*, *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *James* v. *Federal Energy Regulatory Commission*, 755 F.2d 154, 155-156 (Fed. Cir. 1985); *Department of Treasury* v. *FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983).

if Congress had so intended, it would in some way have expressed that intent. Instead, the language of the Statute treats these rights the same and there is no legislative discussion of a different treatment intended.

To the contrary, when Representative Udall introduced the floor amendment which added the new rights to Section 7106(a)(2), he emphasized that the language of section 7106(a)(2), while making these new rights nonnegotiable, also provided for their exercise "in accordance with applicable laws, including other provisions of chapter 71 of title 5." 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924. These "other provisions" included, of course, provisions (which were already in the bill at that time) establishing the broad-scope negotiated grievance procedure, subject to narrowing by the parties' negotiations. See H.R. 11280, 95th Cong., 2d Sess. § 7121, *reprinted in Legis. Hist.* at 419-421 and 124 Cong. Rec. 29180 (1978), *reprinted in Legis. Hist.* at 918. Moreover, in noting that his amendment increased the number of rights reserved to management, Representative Udall stated that "[t]his substitute strengthens the 'Management rights' section reported by the Committee, but it is still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." 124 Cong. Rec. 29183, *reprinted in Legis. Hist.* at 924. Thus, it is clear that Section 7106 addresses what matters are within or outside the duty to bargain, not what matters are or are not grievable.

Turning specifically to contracting-out, nothing in the language or the legislative history of the Statute supports EEOC's position that Congress viewed the exercise of this right as bearing only indirectly on employees so as to exempt that matter from the negotiated grievance procedure. To the contrary, the working text, from which the House Committee refined most of the labor-management provisions of the Committee bill (see *Department of Defense* v. *FLRA*, 659 F.2d at 1156 n.81), actually made contracting-out a negotiable condition of employment. H.R. 9094, 95th Cong., 1st Sess. § 7103(a)(16) (1977), *reprinted in Legis. Hist.* at 244. While the bill the House Committee reported out made the substantive exercise of contracting-out authority nonnegotiable, there is no suggestion that contracting-out's placement in Section 7106(a)(2) altered the fact, made obvious in the

bill which formed the basis for the Committee's working text, that contracting-out remained a condition of employment.[30]

EEOC's argument also draws no support from the law of labor arbitration in the private sector. In the Taft-Hartley Act, Congress established the federal policy favoring arbitration of labor disputes when it stated: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. 173(d). From this congressional statement of policy, this Court enunciated "the now well-known presumption of arbitrability for labor disputes":[31]

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Footnote omitted.]
>
> • • • • •
>
> In the absence of any express provision excluding a particular grievance from arbitrtion, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail • • • ."

Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583, 584-585 (1960). Finally, in circumstances in which the parties' contract language excluded from arbitration matters which were "strictly a function of management," the Court found within the presumption of arbitrability a grievance over contracting-out. *Id.* at 584.

For the federal sector, Congress likewise established a strong policy favoring arbitration of labor disputes. As noted at 21, *supra*, every collective bargaining agreement in the federal sector is required to have a negotiated grievance procedure including binding arbitration (5 U.S.C. 7121(a), (b)(3)(C)). Congress

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[30] Similarly, in the private sector contracting-out is a condition of employment. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).

[31] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377 (1974). See *Allis-Chalmers Corp.* v. *Lueck*, No. 83-1748 (Apr. 16, 1985) slip op. 17. See also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, Nos. 83-1569, 83-1733 (July 2, 1985) slip op. 10-12 (commercial arbitration).

prescribed a broad-scope grievance procedure in the federal sector, with the exceptions being those five subjects specifically enumerated by Congress (5 U.S.C. 7121(c)) or those which the parties specifically bargain to exclude (5 U.S.C. 7121(a)(2)). *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 648 n.34.

In sum, the provisions of the Statute strongly support the conclusion that disputes over management's compliance with applicable contracting-out requirements are arbitrable.[32] There is no basis in the Statute, its legislative history, or under general labor law principles to support EEOC's contention that contracting-out has only an indirect effect on employees and therefore disputes over management's exercise of its contracting-out authority should be nongrievable.

b. EEOC further argues (Pet. Br. 24-29) that even if contracting-out is a matter encompassed by the broad-scope negotiated grievance procedure, compliance issues relating to the Circular are inappropriate for resolution under that procedure because the Circular is not a law, rule, or regulation (Pet. Br. 37), and as such it is "binding" only in the sense that the President may choose to remove an Executive Branch officer who disregards its direction (Pet. Br. 24).[33] However, as the Authority stated in denying EEOC's request for reconsideration (FLRA App. 2a), the extent of the compliance obligation imposed by the Circular is essentially a question of arbitrability. And that question need not be resolved in order to determine the negotiability of the instant proposal. See note 14, *supra*.

Further, EEOC's assertion that the Circular is not a law, rule, or regulation rests principally on cases holding that alleged violations of the Circular are not judicially cognizable.[34] But

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[32] The fact that management's exercise of its authority with respect to a number of conditions of employment in the federal sector is outside the duty to bargain because the conditions of employment are management rights precludes an arbitrator from reviewing management's exercise of discretion in these areas (see 19, *supra*), but as discussed at 22-23, *supra*, it does not narrow the scope of the negotiated grievance procedure.

[33] EEOC's argument only disputes the negotiability of the portion of the proposal referencing the Circular; it leaves unchallenged the negotiability of the language of the proposal requiring EEOC's compliance with "other applicable laws and regulations," *e.g.*, 48 C.F.R. Ch. 1 (cited by EEOC at Pet. Br. 9 n.4).

[34] For example, *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 582 n.28 (3d Cir. 1979) stated that because the Circular "appear[s] to be primarily a

whether an alleged violation of a rule or regulation is judicially cognizable is inapposite to whether a matter alleging that an agency did not adhere to applicable legal requirements in exercising its authority is subject to the negotiated grievance procedure Congress established for collective bargaining agreements. See, *e.g., Carducci* v. *Regan,* 714 F.2d 171 (D.C. Cir. 1983) (finding no judical review available for an employee reassignment based on "poor performance," a matter clearly within the range of matters the Statute makes grievable under a negotiated grievance procedure). Moreover, there is no dispute that EEOC must comply with the Circular. See note 14, *supra.*[35]

EEOC contends (Pet. Br. 24-26, 37), again for the first time in this case, that grievances over alleged noncompliance with the Circular cannot be pursued under a negotiated grievance procedure because the Circular is not a "rule or regulation" within

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loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat[ing] a legally enforceable standard." However, the "loose managerial tool" referred to is not the current Circular, but the pre-1979 Circular. In 1979, Supplement No. 1 to the Circular, the *Cost Comparison Handbook,* explained why revisions were being made to the Circular:

> As Government cost accounting techniques progressed, it became obvious that Circular A-76 guidelines were too general to achieve desirable uniformity, and were insufficient as a basis for comprehensive cost studies.
>
> • • • • •
>
> Detailed instructions for making a cost comparison are set forth in this Handbook for use by all Federal agencies.

Cost Comparison Handbook, at 1, 2. The *Handbook* was also intended "to establish consistency, assurance that all substantive factors are considered when making cost comparisons, and a desirable level of uniformity among agencies in comparative cost analyses." *Id.* at 1. Thus, the revised Circular was specifically designed to remedy the "looseness" of the pre-1979 Circular. In fact, the requirement in the 1979 Circular that agencies establish an appeals procedure (44 Fed. Reg. 20561 (1979)) is a further indication that the Circular imposes requirements against which compliance can be measured.

[35] The Circular was published for notice and comment in the Federal Register prior to adoption. 43 Fed. Reg. 37410 (1978); 48 Fed. Reg. 1376 (1983). The Circular is enacted, as its Section 3 states (48 Fed. Reg. 37115 (1983)), under the authority of the Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*) and the Office of the Federal Procurement Policy Act of 1979 (41 U.S.C. 401 *et seq.*). An agency is obligated to comply with the Circular because, quite simply, the Circular by its own terms requires compliance. OMB Circular No. A-76 (Revised), paragraph 9. 48 Fed. Reg. 37115 (1983).

the meaning of Section 7103(a)(9)(C)(ii) of the Statute.[36] While Congress did not elaborate on the meaning of "rule or regulation" for purposes of that section, the House-Senate Conference Report did specifically intend, with regard to the meaning of "rule or regulation" as used in Section 7117(a) of the Statute, that the term "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158, *reprinted in Legis. Hist.* at 826. OMB Circular A-76 meets this definition of "rule or regulation," as EEOC (Pet. Br. 43) has acknowledged, and as the Authority has held. *AFGE, Local 1923 and Health Care Financing Administration, Baltimore, Maryland,* 17 F.L.R.A. No. 96 (1985) slip op. 6; *AFGE, Local 225 and Department of the Army, U.S. Army Management Research and Development Command, Dover, New Jersey,* 17 F.L.R.A. No. 66 (1985) slip op. 4.

Petitioner argues (Pet. Br. 43 n.23), however, that Congress intended a different meaning for "rule or regulation" when it intended to restrict bargaining (in Section 7117(a)) as opposed to when it intended to expand employee rights by bringing alleged violations of "rules or regulations," as those violations affected conditions of employment, within the negotiated grievance procedure (Section 7103(a)(9)(C)(ii)). EEOC provides no support for this contention. In the absence of any such indication, it is reasonable to conclude that Congress intended the same terms to have the same meaning in the same statute. See, *e.g., Finnegan* v. *Leu,* 456 U.S. 431, 438 and n.9 (1982).[37]

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[36] Even if the Circular were not a rule or regulation, contracting-out disputes could still be matters "relating to the employment of * * * employee[s]," bringing them within the scope of the negotiated grievance procedure by operation of the definition of grievance contained in Section 7103(a)(9)(A) and (B) of the Statute. 5 U.S.C. 7103(a)(9)(A) and (B).

[37] Moreover, notwithstanding EEOC's contention (Pet. Br. 43 n.23) that "rules or regulations" cannot include the Circular whenever that would serve to expand employee rights, the Office of Management and Budget extended to federal sector unions national consultation rights over the Circular in accordance with the requirement in Section 7117(d)(1) that such rights be accorded by "any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment." 5 U.S.C. 7117(d)(1). National consultation rights enable unions holding exclusive recognition for at least 3,500 employees to provide comments to the issuing agency on proposed government-wide regulations affecting conditions of employment. See 5 C.F.R. 2426.11-2426.13.

At bottom, EEOC's argument that the Circular is not the kind of rule or regulation which can be subject to Section 7121 misapprehends how Congress intended the grievance procedure in collective bargaining agreements to operate in the federal sector.[38] Notwithstanding EEOC's contentions (Pet. Br. 21-22) about the role of arbitrators in the private sector, in the federal sector Congress made it clear that "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment * * * " constitutes a grievance, and that consequently arbitrators would be required to consider laws, rules, and regulations. 5 U.S.C. 7103(a)(9); *Andrade* v. *Lauer*, 729 F.2d at 1488-1489.[39] Further, Congress empowered the Authority to resolve exceptions to arbitral awards to ensure that such awards conform to applicable laws, rules, and regulations. 5 U.S.C. 7122(a)(1).[40] Accordingly, the Circular represents the kind of rule or regulation that Congress intended to be within the

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[38] See Elkouri and Elkouri, *Legal Status of Federal-Sector Arbitration*, supp. to *How Arbitration Works*, 3d ed., 7 (1980) ("Arbitral disposition of federal-sector grievances will often be governed or materially affected by laws, rules, and regulations apart from the collective bargaining agreement[.]"). See also Gentile, "Arbitration in the Federal Sector: Selected Problem Areas," 34 *Labor Law Journal* 482, 484 (1983); Harkless, "Comment, Grievance Arbitration in the Federal Service," in *Proceedings of Thirty-Fourth Annual Meeting of National Academy of Arbitrators*, 206, 209 (1982).

[39] See Elkouri and Elkouri, *Legal Status of Federal-Sector Arbitration*, supp. to *How Arbitration Works*, 3d ed., 6-7 (1980) ("The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function of the grievance procedure and arbitration in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike [footnote omitted]."). The grievance mechanism encompasses not only formal rules but also, for example, provisions of the Federal Personnel Manual. See, *e.g.*, *Veterans Administration Medical Center, Fort Howard and AFGE, Local 2146*, 5 F.L.R.A. 250 (1981) (the arbitrated issue was whether the agency had failed to comply with Appendix J to Federal Personnel Manual Supplement 532-1 in denying employees 4% environmental differential pay).

[40] The Authority's responsibility to ensure that arbitrators' awards to which exceptions are taken conform to applicable legal requirements exemplifies Congress' effort "to establish procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. 7101(b).

permissible scope of negotiated grievance procedures, insofar as a complaint concerning the rule or regulation affects conditions of employment of bargaining unit employees.

In the alternative, EEOC argues (Pet. Br. 26-29) that even if the Circular is a rule or regulation within the meaning of the Statute, the Circular does not, as a practical matter, limit the exercise of management's discretion in any meaningful sense so as to provide a basis for arbitral review. Of course, the Circular does contain aspects involving the exercise of management's discretion, and those aspects would not be subject to arbitral review. See discussion at 19, *supra*. But to argue, as EEOC does (Pet. Br. 23), that "the Circular does not impose any identifiable constraints on management" ignores the language of the Circular.[41]

C. The Circular's Appeals Procedure Cannot Override The Operation Of The Statute's Grievance Machinery

Finally, EEOC's contention (Pet. Br. 34-35, 42-47) that the Circular itself bars negotiation over the proposal is without merit. EEOC contends in this regard that Section 7117(a)(1) of the Statute bars negotiations not only over proposals that are inconsistent with a government-wide rule or regulation (Pet. Br. 42-46), but also over proposals that share the same subject matter as a government-wide rule or regulation (Pet. Br. 46-47). However, as this Court has recognized, Section 7117(a)(1) does not preclude bargaining "unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92. See also *Department of the Treasury, U.S. Customs Service* v. *FLRA*, 762 F.2d

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[41] For example, Part IV of the Circular's 1983 Supplement is the seventy-odd page *Cost Comparison Handbook* which "provides detailed instructions for developing a comprehensive comparison of the estimated cost" of in-house versus contract performance and the procedures "are intended to establish a practical level of consistency and uniformity to assure all substantive factors are considered when making cost comparisons." *Cost Comparison Handbook*, at 1. The Circular and its Supplement specify figures to be used in the cost comparison process, ranging from retirement costs for federal employees (50 Fed. Reg. 32812 (1985)) to the useful life to be attached to various classes of equipment (*Cost Comparison Handbook*, at 21). Moreover, to the extent that there are discretionary aspects in the Circular, those aspects would not be subject to arbitral review. See discussion at 19, *supra*.

1119, 1122 (D.C. Cir. 1985); *Library of Congress* v. *FLRA*, 699 F.2d at 1284 n.16; *Department of Defense, Department of the Army* v. *FLRA*, 685 F.2d at 644.

Additionally, the legislative history of Section 7117(a)(1) makes clear that Congress intended only to bar negotiation over proposals that would bring about inconsistencies with law, rule, and regulation. In describing what is now Section 7117(a)(1) of the Statute, the House-Senate Conference Report stated that "[b]oth the House and Senate authorize negotiations except to the extent inconsistent with law, rules, and regulations * * * ." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158, *reprinted in Legis. Hist.* at 826.

Moreover, a broader reading of the bar to negotiations contained in Section 7117(a)(1) would not make sense in the federal sector labor relations program. Many subjects in federal sector bargaining agreements are also the subject of a government-wide rule or regulation, *e.g.*, health and safety (29 C.F.R. 1960); employee performance appraisal procedures (5 C.F.R. 430); reduction-in-force procedures (5 C.F.R. 351); adverse action procedures (5 C.F.R. 752). If collective bargaining were allowed only over proposals that did not address the same subject matter as a government-wide rule or regulation, it is questionable what would be left of the collective bargaining obligation created by the Statute in light of the myriad of government-wide rules or regulations covering a large number of subjects. No court has endorsed such a construction of Section 7117(a)(1).

EEOC additionally argues (Pet. Br. 42-46), however, that Section 7117(a)(1)'s acknowledged bar over proposals that would bring about results inconsistent with government-wide rule or regulation applies to the instant proposal. Specifically, EEOC argues (Pet. Br. 6, 44) that the Circular's statement that its provisions "shall not be construed to create" any new right of appeal is inconsistent with the negotiated grievance procedure, which would be brought into play by operation of the proposal. However, this application of Section 7117(a)(1) to the instant proposal must be rejected for two reasons.

First, the proposal is not inconsistent with the Circular because the proposal does not "create" any new right of appeal. The Circular specifies that the terms of the Circular "shall not be construed to create[ ] any substantive or procedural" right of appeal (44 Fed. Reg. 20558 (1979)); however, the right to file

grievances regarding contracting-out is created not by the Circular but by the broad-scope negotiated grievance procedure authorized by Congress in the Statute. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F 2d at 649. As the Authority properly determined and the court of appeals correctly affirmed, the Statute itself, not this proposal, brings contracting-out determinations within the ambit of the negotiated grievance procedure.

Second, even assuming that there is an inconsistency between the grievance procedure the Statute prescribes for collective bargaining agreements and the grievance procedure set forth in the Circular, there is no indication in the Statute or elsewhere that Congress intended to allow agencies to limit by regulation the statutorily defined grievance procedure. See *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981) (Office of Personnel Management regulation limiting right to grieve nonselection of a repromotion eligible cannot be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under Section 7121 of the Statute). See also *NTEU* v. *Cornelius*, No. 85-0129 (D.D.C. July 15, 1985) slip op. 12-13, appeal docketed, No. 85-5938 (D.C. Cir. Sept. 10, 1985) ("[The Statute] does not permit [the Office of Personnel Management] to regulate away an appeals procedure granted by Congress ." [Footnote omitted.]). As the court below recognized, to allow the text of the Circular to restrict the statutory scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949). While a government-wide regulation bars negotiations over a proposal through which a party would acquire rights that are inconsistent with the regulation, Section 7117(a)(1) does not authorize government-wide regulations to remove the entitlement specifically conferred by Section 7121 of the Statute. Indeed, the logical extension of EEOC's argument would allow an agency that has the authority to issue government-wide rules to alter provisions of the Statute.[42]

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[42] EEOC argues (Pet. Br. 45-46) that courts have previously removed disputes from the jurisdiction of the negotiated grievance procedure. However, in each case cited by EEOC, it has been the result of a conflict between two separate statutes over the rights flowing to a specific category of employees.

Finally, EEOC argues (Pet. Br. 34-35) that in order for management to be able to make its contracting-out determinations in accordance with applicable laws, as required by Section 7106(a)(2) of the Statute, it must be able to comply with not just the substantive aspects of the Circular, but with all aspects of the Circular, including its appeals procedure. EEOC argues (Pet. Br. 34-35) that the proposal prevents EEOC from so complying and therefore interferes with the obligation imposed by Section 7106(a)(2).

This argument ignores the fact that Congress prescribed a statutory broad-scope negotiated grievance procedure which, as set forth at 39, *supra,* cannot be restricted by the Circular. Moreover, this argument incorrectly suggests that the Circular's appeals procedure is part of the way in which management makes its contracting-out determinations in accordance with applicable law. The appeals procedure is not how management exercises its authority to make contracting-out determinations; rather, the appeals procedure is a separate vehicle offered to parties, other than management, who believe they have been aggrieved because management has already made a contracting-out determination not in accordance with applicable law, rule, and regulation. 44 Fed. Reg. 20558 (1979); 48 Fed. Reg. 37114 (1983).

In sum, the proposal is within the duty to bargain. The Circular does not, by its own terms or through the operation of Section 7117(a)(1) of the Statute, curtail the permissible reach established by Congress for the negotiated grievance procedure.

No court has removed a general subject matter from the scope authorized by Congress for negotiated grievance procedures. Of course, Congress could have chosen to exclude matters relating to contracting-out determinations from the permissible scope of a negotiated grievance procedure. The simple fact, however, is that it did not do so. Petitioner's argument is more appropriately directed to Congress. See, *e.g., AFGE, Council of Prison Locals, Local 1286* v. *United States Department of Justice,* 738 F.2d 742, 747 (6th Cir. 1984); *Council of Prison Locals* v. *Brewer,* 735 F.2d 1497 1502 n.9 (D.C. Cir. 1984).

CONCLUSION

The judgment of the court of appeals should be affirmed.[43]
Respectfully submitted.

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NOVEMBER 1985

[43] The Solicitor General authorizes the filing of this brief by Respondent Federal Labor Relations Authority.

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC
LOCALS

Union

and

Case No. O-NG-314
10 FLRA No. 1

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Agency

ORDER DENYING REQUEST FOR RECONSIDERATION
OF DECISION ON NEGOTIABILITY ISSUE

This matter is before the Authority on a request by the Equal Employment Opportunity Commission for reconsideration of the Authority's decision as to Union Proposal 1 in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 FLRA No. 1 (1982). The Union filed an opposition to the Agency's request.

In relevant part, the Authority held in *Equal Employment Opportunity Commission* that, contrary to the Agency's claim, Union Proposal 1 would not affect the scope and coverage of the parties' negotiated grievance procedure since a contractual provision to comply with applicable laws and regulations concerning contracting-out does not itself change the scope and coverage of the parties' grievance procedure beyond that which is authorized under the Statute. In so holding, the Authority emphasized that under the Statute disputes concerning conditions of employment arising in connection with the application of

OMB Circular A-76 and other applicable laws and regulations concerning contracting out would be covered by the negotiated grievance procedure unless the particular grievance is inconsistent with law or the parties exclude such grievances through negotiations.

In seeking reconsideration, the Agency requests that the Authority "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute." The Authority finds that such a request does not establish "extraordinary circumstances" warranting reconsideration as required under section 2429.17 of the Authority's Rules and Regulations.* Rather, the Agency in essence is asking the Authority to make arbitrability determinations in the absence of a specific factual context. To the extent that an arbitrability question may arise in the future, the Agency may, of course, avail itself of the procedures set forth in section 7121 of the Statute for the resolution of such questions. Accordingly, IT IS ORDERED that the Agency's request for reconsideration of the Authority's decision in the instant case be, and it hereby is, denied.

Issued, Washington, D.C., March 18, 1983

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

* Section 2429.17 provides, in pertinent part:

> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. . . . A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. . . .

APPENDIX B

5 U.S.C. 7103(a) provides:

§7103. Definitions; application

(a) For the purpose of this chapter—

* * * * *

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute[.]

* * * * *

5 U.S.C. 7106 provides:

§7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

§7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * * * *

5 U.S.C. 7121(a)-(c) provides:

§7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

* * * * *

Supreme Court, U.S.
FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1728

In the Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents devote a substantial portion of their briefs to contesting propositions that are not in dispute, in the process making this already complex case appear more confusing than it actually is. We certainly agree with respondent Federal Labor Relations Authority (FLRA or Authority), for example, that "the fact that a bargaining proposal mentions a management right enumerated in [5 U.S.C.] Section 7106(a)(2), including the right to contract out, does not of itself render a proposal non-negotiable" (FLRA Br. 17; *id.* at 22-24); we similarly agree that the procedures for implementing management rights and arrangements for affected employees may be discussed at the bargaining table (see FLRA Br. 25-26, 34-35; Union Br. 22). We never have denied that arbitration is a generally desirable method by which to settle labor disputes (see Union Br. 41-43), or suggested that

arbitrators lack the authority or competence to interpret federal regulations (see FLRA Br. 36-37; Union Br. 17-18).[1] And nothing in our argument rests on the proposition that contracting out does not affect "conditions of employment" (see FLRA Br. 31-33), or seeks to establish that the various management rights listed in Section 7106(a)(2) should have differing legal effects (see FLRA Br. 22, 29-32; Union Br. 22-25).

Because respondents have chosen to address all of these peripheral issues, however, our central thesis bears repeating. We recognize (see EEOC Br. 29-34), of course, that the management rights listed in Section 7106(a)(2) must be exercised in accordance with "applicable laws."[2] But that is the only constraint imposed by the Civil Service Reform Act (Act) on the exercise of management prerogatives. The Union's proposal here—which would bind the Equal Employment Opportunity Commission (EEOC) to comply with Office of Management and Budget (OMB) Circular A-76 when the agency exercises its reserved right to contract out—therefore is negotiable only if the Circular is an "applicable law." And as the EEOC's opening brief explains (at 17-35), Circular A-76

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[1] For that matter, we have no quarrel with the Authority's suggestion that there is a presumption of arbitrability in private sector labor disputes (FLRA Br. 32), although the relevance of that proposition to this case is far from clear. Similarly, respondents undoubtedly are correct in suggesting (FLRA Br. 28-29; Union Br. 44-45) that the government may attempt to exclude certain bargainable matters from its collective bargaining agreements. But that hardly is a complete protection for management rights: if a bargaining impasse is reached, the Federal Service Impasses Panel may order the inclusion of the disputed provision in the contract (see EEOC Br. 2-3). In any event, if a bargaining proposal implicates a management right, bargaining about that proposal is altogether impermissible—as the Authority recognizes (FLRA Br. 19).

[2] The Union thus misstates our position (Union Br. 22-24) in reading our opening brief to mean that the "in accordance with applicable laws" language does not constrain management rights.

is not a law at all, let alone an "applicable" one within the peculiar meaning of Section 7106(a)(2). Nothing in respondents' briefs casts any doubt on that conclusion.

A. At the outset, respondents attempt to avoid addressing the meaning of the management rights clause at all. They accomplish this sleight-of-hand by asserting (FLRA Br. 22-25; Union Br. 19-21) that Section 7106 in no way limits the scope of the grievance machinery created by the Act. Instead, they maintain that the clause serves only to keep the parties from *negotiating* about management rights; it does not, they argue, limit the authority of employees to grieve, and arbitrators to decide, issues involving management prerogatives.[3] This proposition is central to respondents' analysis, as it was to the court of appeals' (see EEOC Br. 36-37). If respondents are correct, an agency's asserted failure to comply with Circular A-76 is grievable, whether or not the agency is bound by a collective bargaining agreement that contains a provision like the one at issue here.[4] Against this background, respondents are able to conclude that the inclusion in the contract of the disputed bargaining proposal would not affect the exercise of EEOC's management rights, because the disputed provision simply confirms that alleged failures to comply with the Circular already are grievable (see Union Br. 21).

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[3] Respondents insist that only the matters specified in 5 U.S.C. 7121(c) are excluded from the Act's grievance machinery (FLRA Br. 22; Union Br. 20, 24).

[4] An asserted violation of Circular A-76, of course, is grievable only if the Circular is a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii). In arguing that it is, respondents rely principally on the legislative history of 5 U.S.C. 7117, where Congress indicated that an identical phrase should be read to include binding policy statements (FLRA Br. 35; Union Br. 41). As we explained in our opening brief (EEOC Br. 37-38), however, reading Section 7103(a)(9)(C)(ii) to refer to every law, rule, and regulation on the books would allow unions to obtain arbitration (potentially without judicial review) of virtually every decision taken pursuant to law by every federal agency. Respon-

Respondents' understanding of the relationship of the management rights clause to the Act's grievance and arbitration machinery, however, plainly is flawed. The language of Section 7106(a) is unequivocal: it provides that "nothing in this chapter"—which includes the grievance provisions—"shall affect" management's authority to exercise its reserved prerogatives. By its terms, the reach of this provision is not restricted to management's duty to bargain, for "Congress did *not* say that management's reserved rights are *nonnegotiable*; it said, '*nothing in this chapter shall affect*' the right of the agency to make contracting-out decisions." *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1402 n.7 (9th Cir. 1985) (emphasis in original), petition for cert. pending, No. 85-777. Congress thus placed the management rights clause in a separate section titled "[m]anagement rights," rather than in the provision of the Act dealing with negotiation—in contrast to Executive Order No. 11491, which placed its management rights provisions in sections titled "[n]egotiation of agreements" and "[b]asic provisions of agreements." Exec. Order No. 11491, §§ 11, 12, 3 C.F.R. 861 (1966-1970 comp.), *reprinted at* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 1250, 1251 (Comm. Print 1979) [hereinafter cited as *Leg. Hist.*].[5]

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dents nowhere deny that Congress could not have intended such a result. Even if it may be characterized as a binding policy statement, then, Circular A-76 does not address the sort of personnel decisions that Congress imagined would be grievable under Section 7103(a)(9)(C)(ii). See EEOC Br. 29-34, 37-38.

[5] Recognizing that the management rights clause applies to the Act's grievance mechanism as well as to the bargaining process would hardly, as the Union asserts (Union Br. 24), render Section 7121(c) superfluous. We recognize that management rights must be exercised in accordance with applicable laws (see EEOC

Respondents nevertheless maintain that the Act's legislative history supports their contentions about the scope of the grievance machinery (Union Br. 31-33; FLRA Br. 24-25), relying in large part on Rep. Ford's statement that "infractions of [rules] are fully grievable even if the rule * * * implicates some management right" (see Union Br. 31 (quoting *Leg. Hist.* 998)). We note that these post-enactment remarks are entitled to little weight. See *AFGE, Locals 225, 1504 & 3723* v. *FLRA*, 712 F.2d 640, 647 & n.29 (D.C. Cir. 1983). See generally *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). And in the cited remarks Rep. Ford was, in any event, referring only to matters of procedure: he made clear that his interpretation "is required both by the express language of the section *and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right.*" *Leg. Hist.* 998 (emphasis added). Rep. Ford thus was referring to the portion of the management rights clause establishing a duty to bargain with respect to "procedures which management officials of the agency will observe in exercising any authority under this section." 5 U.S.C. 7106(b)(2).[6]

Br. 29-34; pages 7-16, *infra*), and unions generally may grieve asserted violations of such laws. Section 7121(c) makes nongrievable even claims concerning the asserted violation of such applicable laws when the grievance concerns the matters specified in that provision.

[6] Respondents also attempt to draw support from the comments of Rep. Udall (FLRA Br. 24, 31; see also Union Br. 31-32), contending that, in his view, 5 U.S.C. 7121 is an "applicable law" within the meaning of Section 7106(a)(2). But such a reading of the statute would be nonsensical; it would parse the management rights clause as providing that "nothing in this chapter shall affect the authority of any management official * * * in accordance with [the provisions of this chapter]" to exercise management rights. In fact, Rep. Udall had a more coherent view of the statute. He made clear that the grievance mechanism was intended principally to permit unions to grieve matters that previously could be raised

But neither the Authority nor the court of appeals—nor either of the respondents before the Court—relied on the Section 7106(b)(2) exception (see EEOC Br. 17-18 n.6).

Respondents' approach, moreover, would have extraordinarily far-reaching effects that they fail to acknowledge. It would, for example, make grievable by force of law not only matters relating to the exercise of the management rights listed in Section 7106(a)(2), but also complaints involving the exercise of the prerogatives preserved by Section 7106(a)(1)—which include the right to set "the mission, budget, organization, number of employees, and internal security practices of the agency." As we suggested in our opening brief (at 42), it is difficult to imagine that Congress intended such a result to follow from the enactment of a statute designed to preserve the flexibility of agency managers. See *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985), slip op. 14; 5 U.S.C. 7101(b).[7]

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only through the so-called statutory appeals procedures (see EEOC Br. 33 n.16, 40), explaining: "The Federal employee unions * * * do gain in my substitute some guarantees about procedures that management must follow. They get to arbitrate some things that now go through a torturous appeal process—things involving various labor grievances. * * * * * [T]he arbitration provision I view as much of a gain for management as for labor. The Federal managers now, instead of having to go through difficult, complex appeal procedures, will be able to submit them to arbitration, and this is a gain for management." *Leg. Hist.* 923.

[7] Indeed, while the Authority now insists that the management rights clause constrains only the duty to bargain, its decisions recognize that "the rights reserved to management may not be infringed by an award of an arbitrator and may not be waived or relinquished by an award of an arbitrator." *PATCO & FAA*, 5 F.L.R.A. 763, 767 (1981); *AFGE, Local 1968 & Department of Transportation, St. Louis Seaway Development Corp.*, 5 F.L.R.A. 70, 77-82 (1981), aff'd *sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). In its brief, the Authority recognizes the force of these decisions (FLRA Br. 26-27), but fails to explain how they can be reconciled with its basic argument.

B. The critical question in this case, then, is not whether complaints about the implementation of Circular A-76 fall within the Act's definition of "grievance"; instead, it is whether the Circular is an "applicable law" of the sort that constrains management rights. If the Circular is not such a "law," the Union's bargaining proposal would impose upon management a legal duty to comply with the Circular where none existed previously, a development that plainly would "affect" the exercise of the agency's reserved right to contract out.[8] And the Union's contentions to the contrary notwithstanding, every tribunal to address the matter—the courts, the Merit Systems Protection Board (MSPB), the Federal Labor Relations Council (FLRC) and the Comptroller General—has concluded that the Circular does not create rights that are enforceable in *any* forum. Such a provision hardly can be characterized as a law that constrains agency management.[9]

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[8] While respondents evidently recognize the centrality of this question (FLRA Br. 18; Union Br. 22-24), they give it remarkably short shrift. The Authority fails to address it at all (see FLRA Br. 33), while the Union speaks to it only obliquely (see Union Br. 33-41).

[9] Respondents contend (FLRA Br. 18 n.14) that the EEOC had not, prior to seeking review in this Court, "suggested that it is not obligated to comply with the Circular." To be sure, the EEOC recognizes and is complying with the direction provided by the President in the Circular. But the EEOC never has represented that it is obligated as a legal matter to comply with the Circular. To the contrary, it specified in its petition for rehearing before the court of appeals (at 3) that "the Circular is intended to be binding only in the sense that it is a management tool." And the EEOC argued before the Authority that because "the Circular is a policy statement * * * the authority vested with the agency head cannot be shared with an exclusive labor-organization or subject to any third party determinations" (C.A. App. 13). Indeed, OMB informs us that EEOC never has completed a cost comparison study of the sort mandated by the Circular, although such studies currently are ongoing. For discussion of recent increases in agency implementation of Circular A-76, see Office of Management and Budget, *Management of the United States Government, Fiscal Year 1986*, at 43-46 (1985).

1. As we explained in our opening brief (at 24-26)—in a discussion nowhere challenged by respondents—the Circular is a policy directive that is not designed to implement any particular statutory requirement. It expressly disavows the intention to create third party rights; like most Executive Branch policy directives, it is "intended primarily as a manage[ment] tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). And while, as respondents note (see FLRA Br. 34 n.35), the President certainly expects Executive Branch officials to follow his policy advice, the Circular is binding in precisely the same sense as is a direction given directly by the President to a member of his Cabinet. To our knowledge, no court ever has suggested that an agency's asserted noncompliance with such a directive may be challenged by a third party. See *Kuhl* v. *Hampton*, 451 F.2d 340, 342 (8th Cir. 1971); *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965). Indeed, significant separation of powers concerns would be raised if Congress created a right of action to compel agency compliance with Presidential directives of that sort.

Against this background, it is hardly surprising that every court to consider the question has refused to entertain challenges to agency compliance with the Circular. *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *Local 2855, AFGE* v. *United States*, 602 F.2d 574 (3d Cir. 1979). See also *Defense Language Institute*, 767 F.2d at 1401; *AFGE* v. *Dunn*, 561 F.2d 1310, 1315 (9th Cir. 1977); *AFGE* v. *Hoffmann*, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976).[10] Similarly, the MSPB has held that

[10] The Union insists that the courts "have not shut the door completely on challenges to contracting out actions by federal em-

implementation of the Circular is committed by law to the agency. *Griffin* v. *Department of Agriculture*, 2 M.S.P.B. 335, 336 & n.2, 337 (1980).

In response to this array of authority, the Union asserts principally (Union Br. 36-37 & n.32) that agency compliance with the Circular "routinely" is reviewed by the Comptroller General, a state of affairs that the Union believes "belies the employer's position that [the Circular's] provisions are merely advisory or incapable of review without intrusion into areas reserved for an agency's sole discretion" (Union Br. 37). In fact, however, the decisions of the Comptroller General cited by the Union (Union Br. 37 n.32) stand only for the proposition that contracting out criteria will be reviewed when they are incorporated into the terms of a bid solicitation, and thus into an implied contract between the agency and a contractor. See *In re Federal Employee Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244, 244-245 (1985); *In re Mercury Consolidated, Inc.*, 63 Comp. Gen. 411, 412 (1984); *In re Lear Siegler, Inc.*, 85-1 Comp. Gen. Dec. P613 (May 30, 1985). None of these decisions suggest that the Circular itself imposes enforceable obligations on the government.

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ployees" (Union Br. 38 n.33). This artfully phrased contention is irrelevant here, however, for the cases cited by the Union involved challenges to the application of statutes and binding regulations (*Lodge 1858, AFGE* v. *Webb*, 580 F.2d 496, 499 (D.C. Cir. 1978), cert. denied, 439 U.S. 927 (1978); *International Ass'n of Firefighters* v. *Department of the Navy*, 536 F. Supp. 1254, 1258 (D.R.I. 1982); *Advo-System, Inc.* v. *Kreps*, 471 F. Supp. 116, 117-118 (D.D.C. 1979)), or to the implementation of contracting out criteria incorporated into a bid solicitation and thus into an implied contract with a contractor (*International Graphics* v. *United States*, 5 Ct. Cl. 100, 102, 107 (1984); *International Graphics* v. *United States*, 4 Ct. Cl. 186, 196-199 (1983)). None of these decisions suggested that challenges to implementation of the Circular are judicially cognizable.

To the contrary, the Comptroller General has flatly *rejected* respondents' position that agency implementation of the Circular is reviewable. He recently declared, for example, that his office

> has repeatedly declined to render decisions concerning the propriety of an agency's determination under Circular A-76 to contract for services instead of performing the work in-house. These determinations are beyond the scope of [the] bid protest decision function because the provisions of the Circular are matters of executive branch policy which do not create legal rights or responsibilities.

In re Federal Employees Metal Trades Council, Save Our Jobs Committee, 64 Comp. Gen. 244, 244-245 (1985). Indeed, the Comptroller General has explained more broadly that "Executive orders or directives which are not specifically authorized by statute and which are essentially directed at insuring the efficient operation of the Executive branch are matters of executive policy and do not have the force and effect of law." *In re United States District Court for the District of Columbia*, 58 Comp. Gen. 452, 463 (1979). Accord *In re American Operations Corp.*, 85-1 Comp. Gen. Dec. P231 (Aug. 27, 1985); *In re Excel Services, Inc.*, 85-1 Comp. Gen. Dec. P514 (May 8, 1985).

The Union also looks to pre-Act practice under the Executive Order regime to support its contention that the Circular has been regarded as a law constraining agency management (Union Br. 40-41). Again, however, this contention cannot be squared with the authority. Thus, the FLRC specifically addressed the nature of the Circular, holding early on that "[i]n its own terms A-76 represents policy guidance of a general nature rather than strict injunction and, therefore, does not constitute a regulation of appropriate authority as that phrase is used in the [Executive] Order." *Tidewater Virginia Federal Employees Metal Trades Council & Naval Public Works Center*, 1 F.L.R.C. 431, 441 n.13 (1973). There is

no reason to believe that Congress intended to depart from this understanding when it wrote the Act.[11]

In short, every tribunal to consider the nature of the Circular—both before and after the enactment of the Act—has concluded that the Circular is a tool of presidential management authority that may not be enforced by third parties. And this precedent is hardly, as the FLRA suggests (FLRA Br. 34), "inapposite" to the question whether the Circular is an "applicable legal requirement" that is enforceable by an arbitrator. As we suggested in our opening brief (at 26), it is difficult to imagine that Congress intended to characterize a directive that universally has been held to be unenforceable by anyone other than the President and his delegates as a "law" that constrains management rights.[12] Yet respondents have pointed to no affirmative indication that Congress sought to give unions and union members

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[11] At least in this context, the Union appears to recognize that pre-Act practice is relevant in divining Congress's intent (Union Br. 40). That recognition is well-founded. See *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 103 (1983).

[12] In arguing that Circular A-76 is an "applicable law" within the meaning of Section 7106(a)(2), the Union (Union Br. 41; see also FLRA Br. 35) points to the legislative history of Section 7117, where Congress expressed its intention that "the term 'rules or regulations' be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158 (1978). Section 7106(a)(2), however, in terms refers only to "laws," not to "rules or regulations"—a choice of language that evidently was intentional, since the management rights clause in Executive Order No. 11491 was conditioned by the requirement of compliance with "applicable laws *or regulations*." Exec. Order No. 11491, § 12(b), 3 C.F.R. 861 (1966-1970 comp.) (emphasis added), *reprinted at Leg. Hist.* 1251. See also note 4, *supra*. Thus, Congress plainly did not make the terms used in Sections 7106(a)(2) and 7117 congruent.

a private right of action to oversee agency compliance with the Circular.[13]

2. Respondents also take issue with our narrower suggestion (EEOC Br. 26-29) that Circular A-76 is not a law that constrains management rights because it addresses decisions that are committed to agency discre-

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[13] The Authority, recognizing that at least portions of the Circular address matters that are committed to agency discretion and hence not arbitrable, suggests that "the extent of the compliance obligation imposed by the Circular is essentially a question of arbitrability" that need not be addressed when the threshhold negotiability determination is made (FLRA Br. 33). This suggestion plainly is flawed. The Authority itself repeatedly has held (as it acknowledges in its brief at 15 & n.10, 19-20 & n.16, 27) that a contract proposal is nonnegotiable if it would impose any new constraints on the exercise of a management right. Because Circular A-76 is not an "applicable law" within the meaning of Section 7106(a)(2), requiring compliance with the Circular would impose such a constraint upon the exercise of the management right to contract out. Negotiation about the Union's proposal therefore is impermissible.

Respondents also suggest (Union Br. 21, 34; FLRA Br. 33 n.33) that various government-wide and agency acquisition and contracting out regulations may be incorporated into the Union's contract with the EEOC, even if Circular A-76 itself is not the subject of a duty to bargain. The Court, however, need not address this contention. The Union proposal itself singles out Circular A-76, and the Authority, the court of appeals, and the parties below focused their attention exclusively on the characteristics of that document. Yet the number of statutes and regulations that arguably are applicable to contracting out determinations are myriad. See, *e.g.*, 48 C.F.R. Pt. 7; EEOC Order No. 281 (July 31, 1985). Respondents have not specified the particular statutes and regulations to which they refer, and certainly have not pointed to contracting out regulations that grant rights to employees as individuals (see EEOC Br. 29-34; pages 14-16, *infra*). Whether or not regulations concerning contracting out may be incorporated into union-agency contracts depends upon an assessment of the nature and application of each provision to determine whether it is an "applicable law" that constrains the exercise of management rights within the meaning of Section 7106(a)(2). That determination should not be made in the first instance by this Court.

tion. Respondents evidently recognize that aspects of the Circular's implementation are unreviewable for this reason (Union Br. 45; FLRA Br. 37). But they insist (Union Br. 34-36; FLRA Br. 37 n.41) that portions of the Circular mandate the use of mechanical calculations, and that an arbitrator appropriately may assess the agency's compliance with those portions.

This contention is insupportable. While respondents insist that the Circular is amenable to third party review, every tribunal to address the matter has held that the Circular generally "fail[s] to provide meaningful criteria against which a [third party] may analyze the [agency's] decision." *Local 2855, AFGE*, 602 F.2d at 581. See EEOC Br. 28-29.[14] The reason for this conclusion is plain. A contracting out decision cannot be disaggregated into its component parts; when even threshold decisions turn on management's judgment about what costs are reasonable,[15] there is little point in breaking out and subjecting to arbitration disputes about mechanical calculations that flow from the discretionary choices made by management.

Respondents' assurances about the willingness of arbitrators and the FLRA to abstain from deciding matters

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[14] Respondents maintain (Union Br. 38 n.33; FLRA Br. 33-34 n.34) that the decisions articulating this principle involved a pre-1979 version of the Circular that lacked a detailed methodology for conducting cost comparisons. This is not correct as a factual matter; several of the decisions cited in our opening brief involved application of the 1979 or later versions of the Circular. *Defense Language Institute*, 767 F.2d at 1399; *AFGE, Local 2017*, 680 F.2d at 724 n.4. In any event, application of every version of the Circular has involved some mechanical steps. See, *e.g.*, Circular A-76 (Aug. 30, 1967) at 5 (listing elements of compensation that must be included in making cost comparison study); *id.* at 6 (specifying interest rate used in making calculations).

[15] To give just one example, in determining personnel costs the agency must make an estimate of the staffing required to perform the work in-house. One of the "tools" to be used in making this estimate is "informed judgment." Supplement to OMB Circular A-76, at IV-I. See EEOC Br. 27-28.

that are committed to the discretion of agency managers also may be viewed with some skepticism. Because the Circular often, for example, fails to define its terms (see EEOC Br. 27), there would likely be disagreement on whether a given decision in fact involves a discretionary judgment. Yet the Authority nowhere offers—indeed, given the nature of the decisions involved, it could not meaningfully offer—guidance on the criteria that it would use to separate discretionary from nondiscretionary judgments. And the government might be unable to obtain judicial review of any questionable Authority decision on the point (see EEOC Br. 22-23 n.12; *United States Marshals Service* v. *FLRA*, No. 83-7973 (9th Cir. Dec. 23, 1985); *Tonetti* v. *FLRA*, No. 85-7485 (11th Cir. Oct. 30, 1985)).

3. Even if the Circular is a "law" that fairly may be said to constrain agency management, another question must be answered before the Circular is held to be a restriction on management rights: whether the Circular is an "applicable law" within the meaning of Section 7106(a)(2). This question is entirely disregarded by respondents, who appear to assume that the application of any law by any agency—so long as the implementation of the law affects working conditions—may be challenged by a union or union member in grievance proceedings.[16]

Respondents' reading of the "applicable laws" phrase, however, leads to absurd results. An agency's attempt to implement virtually any federal law will affect, for

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[16] Respondents evidently read the argument appearing at pages 29-34 of our opening brief as asserting that the management right to contract out differs in kind from the other rights listed in Section 7106(a)(2) (Union Br. 22-25; FLRA Br. 29-32). They misunderstand our contention. We suggest, instead, that the proper inquiry is directed to the question whether the law at issue is an "applicable law" within the meaning of Section 7106(a)(2). If it is a law within the peculiar meaning of that phrase, an agency's asserted failure to comply will be grievable; if it is not, failure to comply will not be grievable whenever implementation of the directive implicates a management right.

example, its decision to assign or direct employees. Yet it is inconceivable that Congress intended the Act to permit arbitrators to judge the propriety of agency compliance with appropriations acts, or with the host of statutes imposing substantive duties on agencies—and to do so in a setting in which judicial review might be unavailable (see EEOC Br. 34). In these circumstances, we established in our opening brief (at 29-34) that Congress meant to describe in Section 7106(a)(2) those laws that are directly applicable to the government as employer—that is, laws governing personnel matters that grant rights to employees as individuals.[17] In contrast, Congress did not encompass within that phrase laws whose implementation affects employees only indirectly or incidentally.

This distinction between personnel and other laws is the only one that is faithful to the "'"provisions of the whole law, and to its object and policy."'" *Lindahl* v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985), slip op. 23-24 (citations omitted). First, it serves to preserve the management rights listed in Section 7106(a)(1). These rights are not limited by the "in accordance with applicable laws" phrase. If the "applicable laws" phrase in subsection (2) of Section 7106(a) were interpreted to permit unions to challenge basic agency decisions to conduct reductions-in-force or to contract out, however, the result would be serious encroachment on the rights preserved by Section 7601(a)(1)—which include the agency's right to set its mission, organization, and number of employees.[18] In addition, the distinction

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[17] It should be noted, of course, that not all agency decisions bearing on individual employees are grievable and arbitrable. See, *e.g.*, 5 U.S.C. 7121(c).

[18] In contrast, to the extent that a contracting out regulation grants rights to individual employees—for example, the right to individualized notice before an employee affected by the basic decision to contract out may be reassigned—an affected employee might grieve noncompliance.

we draw recognizes a congruence between the rights granted unionized and nonunionized employees under the Act. Nonunionized employees are permitted to seek extra-agency review of certain personnel decisions (see 5 U.S.C. 7121(d) and (e)) (and may seek intra-agency review of less serious decisions directly affecting them). Respondents have offered no reason to believe that Congress intended to give union members the right to challenge a vastly greater range of agency action. Cf. *Nutt*, slip op. 13. To the contrary, arbitrators under the Executive Order regime reviewed only traditional personnel decisions and did not act to set aside agency decisions relating, for example, to the size of the agency workforce (EEOC Br. 30-32). Those traditional personnel decisions were the sorts of matters that Congress plainly believed it was making arbitrable when it passed the Act (EEOC Br. 32-33 & n.16; note 6, *supra*).[19]

Against this background, nothing in respondents' briefs so much as suggests that the distinction we propose is inconsistent with the language, history, or policy of the Act. And the basic decision addressed by Circular A-76—whether or not to contract out—plainly is one that relates to agency policy, rather than to the agency's relationship with individual employees. The Circular thus is not an "applicable law" that constrains the exercise of management rights.

C. Respondents also have failed to explain why bargaining over the Union's proposal is not barred by 5 U.S.C. 7117(a)(1). They acknowledge (FLRA Br. 39; Union Br. 26) (as the statute flatly states) that the duty to bargain exists only "to the extent not inconsistent

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[19] Similarly, as we noted in our opening brief (EEOC Br. 37), Section 7121(c) makes nongrievable certain limited matters bearing on personnel management. If Congress imagined that the other provisions of the Act provided that challenges to agency compliance with every law and regulation were to be arbitrable, it is difficult to believe that these matters are the only ones that it would have chosen to exclude from the grievance machinery.

with any Federal law or Government-wide rule or regulation." [20] They evidently recognize that Circular A-76 is a government-wide rule for purposes of Section 7117(a)(1) (Union Br. 39, 41; FLRA Br. 35). Although the FLRA argues to the contrary, the Union proposal plainly is inconsistent with the terms of the Circular.[21] Given these factors, the conclusion that the parties may not bargain over the proposal seems inescapable.

In response to the language of the statute, respondents argue only that the Act cannot mean what it says because Section 7117(a)(1), read literally, would permit a federal agency such as the Office of Personnel Management to issue regulations making specified matters nongrievable (FLRA Br. 38-39). But Section 7117(a)(1) addresses only negotiability, not grievability. To the extent that a statute or regulation does not implicate management rights, an asserted violation of that provision therefore would be grievable by force of law, any government-wide regulation notwithstanding. In any event, Congress

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[20] Indeed, respondents acknowledge (FLRA Br. 39-40 n.42; Union Br. 26) the validity of court of appeals decisions holding that the Act's grievance procedures must yield to the exclusive, government-wide appeal mechanism created by the National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5) (see EEOC Br. 45-46). While respondents purport to find these cases inapposite because they involve a conflict between two statutes, this distinction is irrelevant; Section 7117(a)(1) in fact accords government-wide regulations dignity equivalent to that of federal law. See, *e.g.*, *Department of the Treasury* v. *FLRA*, 762 F.2d 1119, 1122 (D.C. Cir. 1985).

[21] The Circular provides that it "does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular," except as provided in the Circular itself. 44 Fed. Reg. 20558 (1979); see also 48 Fed. Reg. 37114 (1983). The FLRA asserts (FLRA Br. 38-39) that the Union proposal is not inconsistent with this provision because the right to arbitral review would be created not by the Circular, but rather by the Act's grievance procedure. As we explain above, however, the drafters of the Circular plainly did not intend to subject its implementation to third party review in any forum.

plainly acted intentionally in drafting Section 7117(a)(1); while using that provision to remove government-wide rules from the bargaining table, in Section 7117(d) it provided labor organizations with "national consultation rights" on the promulgation of such rules. See H.R. Conf. Rep. 95-1717, *supra*, at 155. Respondents' (wholly hypothetical) concerns about the reach of Section 7117(a)(1) accordingly should be presented to Congress.[22]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[22] The same is true of respondents' analysis of the other portion of Section 7117(a)(1), which provides that the duty to bargain does not extend to "matters which are the subject" of a "government-wide rule or regulation." On its face, this provision bars negotiation about the contracting out process—which of course is the "subject" of the government-wide Circular A-76. In response, respondents (FLRA Br. 38; Union Br. 26) suggest only that this reading of the statute must be too broad, because it would exclude too many subjects from the bargaining process. They have failed, however, to offer any alternative reading of the statutory language.

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NO. 84-1728

In The

Supreme Court of the United States

October Term, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS,
Intervenor.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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NO. 84-1728

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Intervenor.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 36. Petitioner and respondent have consented to the filing of this brief and the consent of each has been lodged with the Clerk of this Court. Intervenor has withheld consent.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of litigating in the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position is in furtherance of the public interest. The Board of Trustees has approved the filing of the amicus curiae brief in this matter.

PLF, since its inception, has advanced the causes of limited government and furtherance of the free enterprise system. By submitting an amicus curiae brief in this case PLF will advance these tenets. PLF's position is that the public has a strong interest in the expansive use of the private sector by federal agencies in obtaining goods and services. The practice promotes a more efficient governmental and administrative system, concomitantly benefiting the public with better services at lower cost. Additionally, such interaction with the private sector enhances productivity and the free enterprise system through competitive bidding and expanded commercial opportunities. As such, the public interest in an agency's ability to effectively contract out is substantial.

For these reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

DATED: August, 1985.

Respectfully submitted,

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NO. 84-1728

In The

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Intervenor.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 744 F.2d

842 (1984). The decision and order of the Federal Labor Relations Authority is reported at 10 F.L.R.A. 3 (1982).

SUMMARY OF ARGUMENT

The practice of contracting out by the federal government is in the public interest. The policy of the United States government, and one which should be continued, is to rely on private, commercial sources to provide goods and services whenever they can be procured more efficiently from the free enterprise sector. This results in a more effective government and productivity enhancement for private business. Consequently, management needs to be unhindered by public employee collective bargaining and grievances in making contracting out decisions.

Congress embodied this policy in Section 701 of the Civil Service Reform Act. 5 U.S.C. § 7106. The plain language of this section provides for agency managerial discretion in many areas, including contracting out. Contrary to the decision of the court below, the phrase "in accordance with applicable laws" should not be interpreted in a manner which results in this decisional freedom being interrupted. When interpreted in its entirety, Section 701 is not, as the court below held, subservient to the statutory grievance procedure in the Civil Service Reform Act. Interpreting this section (entitled "Management Rights") in such a crabbed manner renders it meaningless, resulting in an unwarranted dilution of managerial discretion in the area of contracting out.

STATEMENT OF THE CASE

The Civil Service Reform Act, 5 U.S.C. §§ 7101-7135, governs labor-management relations in the federal sector and was intended to balance the right of federal employees to engage in concerted activity with the need of federal managers to achieve an "effective and efficient Government." 5 U.S.C. § 7101(b). The provision of the Act at issue in the case before the Court is Section 7106 which reads "nothing in [this Act] shall affect the authority of any management official of any agency . . . to assign work, *to make determinations with respect to contracting out,* and to determine the personnel by which agency operations shall be conducted." (Emphasis added.)

During contract negotiations with the Equal Employment Opportunity Commission (EEOC), the union proposed that the agency agree to comply with an Office of Management and Budget circular relating to contracting out. By its own terms, the circular does not "create any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with [the] Circular." EEOC refused to bargain on this issue in light of the clear statutory language of the Civil Service Act which places the subject matter of contracting out beyond collective bargaining. The union (AFL-CIO) sought an order from the Federal Labor Relations Authority to force EEOC to bargain over the applicability of the circular. This appeal arises out of the granting of that order.

ARGUMENT

I

ELEMENTAL RULES OF STATUTORY CONSTRUCTION REQUIRE THAT PETITIONER BE UNIMPAIRED BY COLLECTIVE BARGAINING AND GRIEVANCE PROCEDURE IN MAKING CONTRACTING OUT DETERMINATIONS

The Civil Service Reform Act provides that "nothing in [the federal law relating to federal labor-management relations] shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to make determinations with respect to contracting out . . . ." 5 U.S.C. § 7106. A simple reading of the statute indicates that contracting out determinations are intended to be left to the discretion of the agency. But even if a simple reading is not sufficient, the same conclusion is reached by reference to basic rules of statutory interpretation.

A. The Meaning of the Statute Must Be Sought in the Language in Which the Act Is Framed

This Court has repeatedly held that the judicial inquiry into the meaning of a statute must first find its situs in the language of the Act itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Caminetti v. United States*, 242 U.S. 474, 485 (1917). As *Caminetti* directs, once the Court's attention has been directed to the pertinent language, the "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary . . . sense, and with the meaning commonly attributed to them." *Id.* at 485-86. If these words are free from doubt and admit of no more than one meaning, the Court's function is to enforce the statute according to its terms.

In interpreting Section 7106, there is no need to look beyond the four corners of the statute itself. None of the words or phrases contained in that section purports to have dual meanings or technical definitions beyond ordinary understanding. Employing the *Caminetti* inquiry, neither has Congress expressed a contrary intention that the language is to connote anything but the "meaning commonly attributed to them." Indeed, Congress has expressed itself in "familiar English words [with] no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense." *Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 618 (1944).

Moreover, the policy and intent of this section, ascertainable from the language itself,[1] is a congressional desire to preserve certain management prerogatives and to protect agency authority. Not only is this clear from the wording of the section's title—Management Rights—but the detailed listing of powers is indicative of a legislative purpose to repose in management alone specified substantive authority, thus better promoting administrative efficiency. This clear legislative policy afforded to agency management in making contracting out decisions should not be stifled "by a pedantic or grudging process of construction." *Id.* at 617.

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[1] "[W]hen words are free from doubt they must be taken as the final expression of the legislative intent. . . ." *Caminetti v. United States,* 242 U.S. at 490. "Ascertainment of congressional intent with respect to the standard of liability created by [10b-5] must . . . rest primarily on the language of that section." *Ernst & Ernst v. Hochfelder,* 425 U.S. at 200.

B. The Court Below Misinterpreted the Phrase: "[I]n Accordance with Applicable Laws"

Despite the clear language of Section 7106 removing contracting out determinations from being subject to federal labor negotiations the court below found, as authority for its opinion, the "restriction" that contracting out determinations must be made "in accordance with applicable laws." In reality, this phrase is no restriction at all.

The dissent below correctly identified the plain error committed by the majority in interpreting the phrase to include the statutory grievance procedure codified in Section 7121. 744 F.2d at 857. Under the majority's analysis, the union proposal regarding the applicability of the circular did not affect management's substantive authority reserved pursuant to Section 7106, because the grievance procedure was independently available. 744 F.2d at 850. However, the majority, in interpreting the phrase as allowing a grievance based on virtually "any matter," *id.* at 849, completely eviscerates Section 7106. The majority's interpretation of this phrase not only ignores the rules of statutory construction, but it also undermines the policy embodied in the code section.

The majority previewed the pertinent language of Section 7106(a) and then rejected the EEOC's argument (management has complete discretion in contracting out decisions) as "untenable in light of the plain text of the clause." 744 F.2d at 848. Unfortunately, the majority violated its own use of the plain meaning rule. It recognized that "nothing in this chapter shall affect the authority of any management official," 5 U.S.C. § 7106, yet the opinion then allowed the grievance procedure to have a

substantial impact on that authority. As Judge MacKinnon correctly characterized the majority opinion:

> "Thus, [the majority] in effect reads the statute as follows: 'Nothing in this chapter [71], EXCEPT ALL THE OTHER PROVISIONS OF CHAPTER 71, INCLUDING § 7121 (PRESCRIBING GRIEVANCE PROCEDURES), shall affect the authority of any management official . . . .' It is absurd to construe the act to say that '*nothing*' in the rest of Chapter 71 affects management's right, but that the rest of Chapter 71 *does* affect that right." 744 F.2d at 857 (emphasis in original).

In addition to this self-contradictory interpretation of the statute, the majority also undermined the interpretive guidelines of *Addison* by stifling legislative policy with distorted construction. As Judge MacKinnon persuasively contended, the union proposal, by embodying Office of Management and Budget (OMB), Circular A-76, 48 Fed. Reg. 37,110 (August 16, 1983), Circular A-76, in effect provided substantive policy making criteria, *i.e.*, cost-effectiveness guidelines. 744 F.2d at 855. Such a proposal, contrary to the majority's contention, directly interferes with the Section 7106(a) powers of management and thus disregards congressional intent.[2]

In addition to the above, further evidence indicates the majority's uncertainty in its interpretation of the phrase "in accordance with applicable laws." First, the majority treats the circular as an "applicable law" within the meaning of the contested phrase. Unfortunately, this overlooks the crucial fact that the circular is not "law" at

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[2] *Compare Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981); union proposal regarding seniority criteria held to interfere with Section 7106(a) rights. *Id.* at 1159.

all but only a statement of executive policy accompanied by cost-effectiveness guidelines. The circular itself states that it merely "establishes federal policy regarding the performance of commercial activities." Circular A-76, 48 Fed. Reg. at 37,110. Moreover, in *American Federation of Government Employees v. Brown,* 680 F.2d 722 (11th Cir. 1982), the court in referring to Section 806 of the Department of Defense Authorization Act noted that "[s]ection 806(a) had the effect of elevating certain aspects of Circular A-76 to the status of law." *Id.* at 724. Implicit in this statement is that the circular standing alone has no legal force. It is simply an executive managerial tool for implementing the government's policy of relying on private concerns. *Local 2855, AFGE (AFL-CIO) v. United States,* 602 F.2d 574, 582 n.28 (3d Cir. 1979). This is consistent with the comptroller general's conclusion that the circular is merely an expression of executive policy and does not have the status of law. 26 Cont. Cas. Fed., Paragraph No. 83,319 (1979).

Second, while the court below contended that management's contracting out authority is limited by the "applicable laws" phrase, the opinion is silent as to the situs of these laws. The reader is referred to no specific code sections. The court makes continued reference to "statutory or regulatory parameters" (744 F.2d at 851) and "requirements" (*id.* at 848), but these general labels provide little, if any, direction.

Amicus contends that the phrase here in question is of de minimis significance in an interpretation of Section 7106. Admittedly, the rule is that effect must be given to every clause within a statute; the cardinal principle of statutory construction is to save and not to destroy. *United*

States v. Menasche, 348 U.S. 528, 537 (1955). However, the phrase "in accordance with applicable laws" in the context of Section 7106 merely acknowledges the existence of statutes dealing with those items enumerated in Section 7106(a)(2)(A)-(D). While there is no indication by Congress as to the precise meaning of "applicable laws," what is certain is that "applicable laws" do *not* encompass other sections of the chapter (Section 7106(a)). This effectuates congressional policy regarding the management prerogative. Consequently, this phrase is a broad provision referring to any applicable laws—except those provisions, such as Section 7106, which are specifically removed from applicability.

C. Requiring EEOC to Bargain over the Contracting Out Proposal Renders Section 7106(a) Meaningless, a Result Totally Inconsistent with Congressional Intent and Statutory Construction

As previously mentioned, Judge MacKinnon persuasively argued that the proposal advanced by the union was in fact substantively oriented and thus impacted on management's authority and statutory rights. The majority's position, in turn, is completely opposite, finding the proposal negotiable. The result of the majority's decision is that the union is able to achieve precisely what the management rights clause was designed to prevent. This interpretation renders Section 7106 meaningless.

In interpreting Section 7106, several tenets of construction are persuasive. First, the section explicitly provides that "nothing in this chapter *shall* affect" management authority. (Emphasis added.) The emphasized language signals a mandatory construction of this provision.

This mandatory language is buttressed by the principle set forth in *Mastro Plastics Corp. v. National Labor Relations Board,* 350 U.S. 270, 285 (1956): When expounding a statute, the overall object and policy of the law is useful in interpretation. The language of Section 7106 indicates a strong congressional intent to preserve management prerogative and decision making. The combination of the mandatory word choice and the congressional policy indicates the overall importance of this section of the 1978 Act.

More importantly, the entire purpose of bargaining over a proposal such as this is to decide whether or not the proposal should be incorporated into the collective bargaining agreement. The union's goal, of course, is incorporation. Such an outcome, however, is even more destructive of Section 7106. Once the proposal is incorporated, any alleged violation is referred to an arbitrator. This places the ultimate authority to make determinations with respect to contracting out in the arbitrator's hands, completely invalidating the management rights provisions in Section 7106. No result could be more contrary to congressional intent.

Hence, the majority's opinion, in advancing the negotiability of the substantive proposal, has gutted the paramount provisions of Section 7106. In so doing, it has not only ignored rules of statutory construction, but it has also countermanded Congress' purpose in enacting Section 7106—the protection of management rights to promote an efficiently administered agency.

II

CONTRACTING OUT BY GOVERNMENTAL AGENCIES IS IN THE PUBLIC INTEREST

The relationship between the public and private sectors has significantly changed during the last several decades. What were formerly traditional distinctions between government and private industry are no longer. As one writer has stated:

> "[T]he . . . national interests which are at stake no longer permit science and technology to advance at the pace that economic factors would alone dictate. . . . [B]ecause of the importance of atomic energy and aerospace technology . . . the American people have found it necessary to finance . . . technological activity. The preponderance of the nation's scientific and engineering talent remains in the private sector. . . . [T]he government . . . has continued to depend upon nongovernmental sources."[3]

While the above speaks to the narrowing gap between government and the private sector in the area of research and development, this premise is applicable to all areas of government and private relations.[4] Moreover, this growing closeness between both sectors necessarily involves contracting out determinations.

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[3] Johnson, *The Expanding Role of Contract in the Administration of Research and Development Programs,* 31 Geo. W. L. Rev. 747, 749 (1963).

[4] *See California State Employees' Association v. Williams,* 7 Cal. App. 3d 390, 398-99 (1970); *Private Responsibility for Public Management,* Harv. Bus. Rev. 7 (March-April, 1967).

A. Contracting Out by Governmental Agencies Promotes Cost-Effectiveness and Administrative Efficiency

It is the stated policy of the United States government to attain quality and cost-effectiveness whenever feasible through contracting out. Indeed, this is the controlling premise upon which Circular A-76 is based. As noted in *American Federation of Government Employees v. Brown*, 680 F.2d at 724:

> "The general policy of the federal government is to rely on competitive private enterprise to supply the products and services it needs except when . . . cost analysis indicates that procurement from a private source is not as cost-effective as in-house performance."

This concern for efficiency is seen on a broader scale throughout the entire 1978 Civil Service Reform Act. Section 7101(b) specifically mandates that the language of the Act be interpreted "in a manner consistent with the requirement of an effective and efficient Government." As the controlling theme pervading the entire Act, it indicates congressional intent strongly favoring contracting out.

There are several examples of just how effective the use of contracting with private enterprises has proven. For instance, in *Brown*, 680 F.2d at 722, the Army had contracted out maintenance, transportation, and supply services to private firms. The estimated 58-month savings from these programs was $32 million. *Id.* at 724. On a broader across-the-board implementation of Circular A-76, the Department of Defense has reported annual savings of $409 million since 1979. United States Office of Management and Budget, *Management of the United States*

Government: Fiscal Year 1986 at 45 (1985). This same report by the OMB noted that "[r]ecent experience shows that improved quality as well as cost reductions averaging over 20% have been obtained through well-planned cost competitions with private business." *Id.* at 43.

These savings, however, are only at the threshold of major cost reductions. Circular A-76 has been effective to date, but its implementation has been poor. Hence, the OMB is undertaking to refocus the program by establishing a productivity clearinghouse. *Id.* at 44. The president's study on private cost control estimates that such aggressive implementation of Circular A-76 could produce a three-year savings of $7.39 billion. 10 President's Private Sector Survey on Cost Control, *Report on Management Office Selected Issues: Opportunities Beyond PPSSCC* at 2 (1983).

In addition to these cost benefits of contracting out, another result of this governmental practice is improved administrative agency quality and efficiency. Indeed, Circular A-76 requires agencies to develop performance standards and quality assurance plans to evaluate results. The OMB is also formulating government wide performance standards. OMB, *Management of the United States Government: Fiscal Year 1986* at 44.

Through contracting out, not only is management able to exercise its discretion and choose the most productive contractor, but commercial bidders can enhance agency productivity. The above OMB study recognized improved quality through private sector participation. *Id.* at 43. This by-product of efficient government was perhaps best explained by the District of Columbia Circuit Court of Appeals in *National Treasury Employees Union v. Federal*

Labor Relations Authority, 691 F.2d 553, 563 (D.C. Cir. 1982):

> "[T]he right to determine what work will be done, and by whom . . . is at the very core of successful management . . . . It follows necessarily that this right is essential to management's ability to achieve optimum productivity, and accordingly to the agency's ability to function in an effective manner."

The pursuit of contracting out is an established governmental policy resulting in more efficient use of tax dollars and improved agency operations. This policy has been, and remains, in the public interest.

B. Contracting Out Benefits the Private Sector Through Enhanced Productivity and Competition

In addition to placing its own house in order through cost-efficiency and effectiveness, the government's contracting out policy is also geared toward private benefit. Indeed, the circular specifically notes that "[c]ompetition enhances quality, economy, and productivity." OMB Circular A-76, Paragraph No. 5(a).

Moreover, this policy has been specifically codified by legislative enactment. Under the defense department procurement policy (10 U.S.C. §2301, *et seq.*), Congress has made its purposes quite clear. Section 2301, for instance, states that "contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology." The same section continues by expressing interest in small business and recommending that a "fair proportion" of purchase contracts be placed with such concerns.

These sections indicate that both the executive branch and Congress recognize the substantial private benefit that is created by the contracting out policies of the federal government. The policy may result in government cost savings, but it also benefits commercial interests, both large and small. Consequently, free enterprise and the commercial segments of society with goods and services needed by the public sector have a bona fide interest in government contracting out and a concomitant interest in its implementation.

III

REQUIRING AGENCIES TO BARGAIN OVER UNION PROPOSALS REGARDING CONTRACTING OUT WILL RESULT IN LESS EFFICIENT GOVERNMENT

In *Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140, the court noted that the negotiability of a proposal does not mean that the agency must agree to it; such a negotiability finding merely requires that the agency bargain in good faith upon the union's request. *Id.* at 1147. How then does the negotiation of the union's proposal in the case at bar affect management's determinations regarding contracting out?

First, it is important to realize that Section 7106 is a reservation of management rights. These powers are reposed in the governing authority of the agency—the management officials who are best qualified to make decisions concerning those areas as they relate to agency operations. Given the importance of this section, courts have held proposals, which impact on these substantive

rights, nonnegotiable.[5] Facially, there may appear to be no impact on the Section 7106(a) rights until the proposal is actually adopted. Nonetheless, negotiability alone does indeed impact management's rights.[6]

This position is logical. After all, the union's sole purpose in negotiating the proposal is to ensure its adoption into a collective bargaining contract. Such an adoption would be inconsistent with the reserved management authority. This being so, the initial negotiation of the proposal is equally prohibited, since it cannot be adopted into the contract without ignoring Section 7106(a). The court in *National Treasury Employees Union*, 691 F.2d at 563, recognized this when it held that Section 7106(a), by reserving invaluable management rights, insulated them from dilution at the bargaining table. Hence, since the proposal would dilute management authority, it is infringing on that authority and is thus nonnegotiable.

By holding the applicability of the circular nonnegotiable, contracting out determinations can be pursued unhindered. Management will thus feel free to vigorously

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[5] *See American Federation of Government Employees, AFL-CIO, Local 1968 v. Federal Labor Relations Authority*, 691 F.2d 565 (D.C.Cir. 1982), proposal regarding the formulation of performance measures held nonnegotiable; *Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140, proposals conditioning job assignments or seniority held nonnegotiable; *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, proposal addressing critical job elements for performance review confined to management and not negotiable.

[6] *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, determination of nonnegotiability insulates Section 7106(a) rights from "dilution at the bargaining table." *Id.* at 563.

implement Circular A-76 without having to speculate whether a contracting out determination will be the subject of a grievance adjustment.

In combination with this, of course, is the motivation of the union. By drafting proposals concerning contracting out and then appealing an agency's refusal to negotiate, the agency will inevitably be delayed in making contracting out determinations. Moreover, such tactics would undoubtedly be employed without considering the merits of the contracting out process itself and its efficiency potentials.

As mentioned earlier, in propounding a proposal, the union hopes to incorporate it within a collective bargaining agreement. Such a result would be to the detriment of government efficiency because the ultimate authority to contract out would be shifted from agency management pursuant to Section 7106(a) into the hands of an arbitrator. An arbitrator is less qualified to make such a determination than the officials who are familiar with their administrative agencies and thus are best able to gauge cost-effectiveness. Removing such determinations from an agency's discretionary realm to an arbitrator would unnecessarily obstruct implementation of Circular A-76.

CONCLUSION

The current administration is presently engaged in a broad program designed to reduce federal spending, and extensive implementation of Circular A-76 is one area in which substantial cost savings are expected—some $7 billion over three years. This estimate, however, will require

vigorous use of the circular and its guidelines. The president's private sector cost study group recognized this and pressed for greater implementation of the circular. In order to achieve the cost savings potential held by Circular A-76, management needs unhindered freedom in its contracting out determinations; union proposals and manipulation of the statutory grievance procedure designed to stall management decisions cannot be tolerated. Only through greater exercise of managerial discretion will the public and private benefits of Circular A-76 be fully realized.

DATED: August, 1985.

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No. 84-1728

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a collective bargaining proposal that does not establish any substantive limitations on a federal agency's managerial right to make determinations with respect to contracting-out, but instead only restates an agency's existing obligation to comply with requirements in Office of Management and Budget Circular A-76 and other applicable laws and regulations concerning contracting-out, is within the duty to bargain under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

The National Federation of Federal Employees is the second largest labor union which represents federal employees by, *inter alia*, negotiating collective bargaining agreements with federal agencies and representing such employees through negotiated grievance and arbitration procedures. *Amicus* and their members have a vital interest in this case which questions to what extent con-

tract proposals concerning contracting-out procedures are a mandatory subject for bargaining.

Petitioner urges this Court to hold that any contract proposal that affects agency contracting-out decisions is contrary to the management rights clause of the Civil Service Reform Act and thus nonnegotiable. The position urged by the government is not supported by the statutory language of the Act that authorizes negotiations concerning procedures which an agency will observe when making determinations to contract out work to the private sector.

Amicus was a party in *Defense Language Institute* v. *Federal Labor Relations Authority*, 767 F.2d 1398 (9th Cir. 1985), which involved the same issue as the instant case.[1] *Defense Language Institute*, which was decided after certiorari was granted in this case, is cited by the government in its brief (Pet. Br. 19).

Amicus is submitting its brief to assist the Court in its consideration of the issues raised by this litigation. *Amicus* intends to present in simple fashion arguments that it does not anticipate respondents will dwell upon which are nevertheless in support of respondents' position.

STATEMENT OF THE CASE

Amicus adopts the statement of the case of respondents.

SUMMARY OF ARGUMENT

The gist of our argument is that the disputed proposal, calling for compliance with OMB Circular A-76, is primarily procedural in nature. It does not "directly interfere" with management's right to make contracting-out determinations. Management remains the sole determinator. The proposal merely sets forth generally the proce-

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[1] *Amicus* intends to file a petition for a writ of certiorari on or before November 6, 1985, in the cited case.

dural steps management will observe in exercising its authority. Thus, the proposal is negotiable.

The fact that the proposal, if adopted by the parties as a contract term, would be grievable does not cause the proposal to become nonnegotiable. The proposal does not suggest grieving the contracting-out determinations themselves. Such proposals have been found by the Authority to directly interfere with the exercise of management rights and held nonnegotiable. In addition, management has a viable recourse: to propose at the bargaining table that the contracting-out article in the parties' eventual agreement be excluded from the grievance procedure.

Thus, the instant proposal is negotiable since it does not directly interfere with the exercise of management's right to make contracting-out determinations. Deference is due the Authority's negotiability decision, and the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. The Disputed Proposal Is Procedural in Nature and, Therefore, Is Negotiable.

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, is "a comprehensive version of the laws governing the rights and obligations of civil servants, [and] contains the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 91 (1983). Title VII of the Act, 5 U.S.C. 7101 *et seq.*, requires federal agencies and unions representing agency employees to negotiate in good faith over terms and conditions of employment. 5 U.S.C. 7103(a)(12) and 7117.

Yet, many matters considered negotiable in the private sector are reserved as management rights of the agencies and, with the exception of specific areas, are not subjects for bargaining. In 5 U.S.C. 7106(a), the Act provides,

"Subject to subsection (b) of this section, nothing in this Chapter shall affect the authority of any management official of any agency" to exercise a number of enumerated management prerogatives, including the right "in accordance with applicable laws . . . to make determinations with respect to contracting-out." 5 U.S.C. 7106 (a)(2)(B). Thus, considered alone, it appears this provision renders nonnegotiable any bargaining proposal that would affect agency decisions relating to contracting-out.

However, two types of proposals are negotiable with respect to the exercise of these enumerated rights by agency management. The Act further provides,

> Nothing in this section shall preclude any labor organization from negotiating . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section[.]

5 U.S.C. 7106(b)(2). Also, agencies are required to negotiate over "appropriate arrangements for employees adversely affected" by the exercise of these management rights. 5 U.S.C. 7106(b)(3). With respect to the right to contract-out, an agency must negotiate in good faith over procedures it will observe when exercising its authority to make contracting-out determinations.

The Federal Labor Relations Authority, an independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process, adjudicates negotiability disputes. 5 U.S.C. 7105(a)(2)(E). In resolving such disputes that arise from the tension existing within Section 7106, the Authority has classified proposals as either negotiable procedures under Section 7106(b) or nonnegotiable substantive rights under Section 7106(a). To distinguish between the two, the Authority has developed a "direct interference" test.[3]

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[3] A second test was developed by the Authority when reviewing the negotiability of purely procedural proposals. Such proposals

Proposals which "stand close to the uncertain border between procedure and substance" are nonnegotiable if their adoption would "directly interfere" with management's reserved rights. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1159 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). Thus, a proposal would be declared nonnegotiable if it would directly interfere with an agency's substantive right, such as management's ability to make contracting out determinations.

While in the instant case, the Authority did not expressly classify the proposal as procedural and did not explicitly apply the direct interference test, the analysis of the union proposal is ultimately the same. (Pet. App. 9a-10a n.12). The union proposed that "[t]he Employer agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out." Circular A-76 describes the step-by-step procedures agencies should follow in calculating cost analysis, the results of which assist agencies in deciding whether to contract-out a function to private industry or to retain performance of the function in-house. 44 Fed. Reg. 20556 (1979). Circular A-76 and other applicable laws and regulations are existing external limitations on management's right to make contracting-out determinations. The union proposal merely provides a contractual procedure to assure compliance with Circular A-76 and other applicable contracting-out laws and regulations. The proposal does not establish, either expressly or by incorporation, additional limitations on management's substantive right to make contracting-out determinations than already exist externally. If the proposal became a part of the labor contract between the parties, the agency still would retain the full degree of discretion to make con-

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are negotiable unless the agency can show that implementation would prevent management from "acting at all." *Department of Defense* v. *FLRA*, 659 F.2d at 1153.

tracting-out determinations. The proposal would not "directly interfere" with the exercise of that discretion by management.

In concluding that the disputed proposal is negotiable, the Authority implicitly found the proposal to be a procedural limitation, which is permissible under 7106(b)(2), rather than a substantive limitation on management's right to contract-out. This conclusion has been confirmed by a subsequent Authority decision. In *AFGE, Local 225 and Department of the Army*, 17 FLRA 417 (1985), the Authority referred to the proposal in the instant case as "being only procedural in nature" creating no substantive limitations on management's authority to contract-out. At 422.

In summary, application of the "direct interference" test illustrates that the disputed proposal does not prevent management from making contracting-out determinations but merely requires management to follow procedures that already exist. Since it does not directly interfere with the exercise of a management right, the proposal is not in conflict with 7106(a)(2)(B). Rather, the proposal states a procedure, consistent with 7106(b)(2), that management will observe in exercising its right to make contracting-out determinations, and thus is negotiable. This Court can conclude, therefore, that the deference due the Authority is warranted and affirm the judgment of the Court of Appeals.

II. Access to the Grievance Procedure Is Not a Factor in Determining Whether a Proposal Is Negotiable.

All collective bargaining agreements must contain a negotiated grievance procedure and binding arbitration for the resolution of contractual disputes. 5 U.S.C. 7121 (a) and (b)(3)(C). Once the Authority holds a proposal negotiable as procedural under 7106(b)(2), or as an appropriate arrangement under 7106(b)(3), and the

parties adopt the proposal as a contract term after further bargaining, violations of that term are subject to the negotiated grievance procedures, unless specifically made nongrievable by the contract. 5 U.S.C. 7121(a). Besides those matters that are explicitly excluded from grievance coverage, 5 U.S.C. 7121(c), or specifically made nongrievable by the contract, 5 U.S.C. 7121(a)(2), grievances are any complaint "concerning any matters relating to the employment of the employee," 5 U.S.C. 7103(a)(9)(A) & (B); the effect, interpretation or breach of the contract, 7103(a)(9)(C)(i); or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment," 7103(a)(9)(C)(ii). Proposals found by the Authority to be primarily procedural in effect, and therefore negotiable, and that are incorporated into the contract can be grieved in order to learn their effect or interpretation or to determine whether a breach has occurred. 5 U.S.C. 7103(a)(9)(C)(i).

Petitioner argues that if the disputed proposal, calling for compliance to Circular A-76 and other applicable contracting-out laws and regulations, is negotiable, it would be subject to the grievance procedure. The net effect, according to the government, would be that employees and labor organizations could challenge the exercise of management's right to make contracting-out determinations through the negotiated grievance machinery. However, the Authority negotiability review process considers how the proposal "affects" the relevant management right and not "what if" the proposal should be grieved and decided by an arbitrator. As mentioned above, the Authority analyzes whether the proposal will "directly interfere" with the exercise of a management right. If it does not, and management remains solely in control of the final determination, the proposal is found to be a negotiable procedure management will observe when exercising its rights. A finding in favor of negotiability

only requires the agency to bargain over the proposal in good faith and upon the union's request. The Authority neither considers the proposal's merits nor orders the agency to agree to it. *Department of Defense*, 659 F.2d at 1147.

The instant proposal should be compared to proposals that attempted specifically to provide a grievance procedure to challenge management determinations with respect to contracting-out. *See AFGE, Local 225*, 17 FLRA at 421; *AFGE, Local 3403 and National Science Foundation*, 6 FLRA 669, 673-675 (1981). The Authority held such proposals nonnegotiable because the proposed grievance procedure would cover the actual decision to contract-out itself. *Id.* No grievance procedure can be negotiated which would deny authority to an agency to exercise its management rights. *See AFGE, Local 1968 and Department of Transportation*, 5 FLRA 70, 77-80 (1980), *enforced sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1981), *cert. denied* —— U.S. —— (1983) (proposals establishing grievance review of the critical elements and performance standards determined by management held not negotiable). Unlike these nonnegotiable proposals, the instant proposal does not propose to establish a grievance procedure to challenge the actual contracting-out determination. Rather, it proposes that management comply with the step-by-step procedures contained in Circular A-76 which management must observe in the process toward making its contracting-out determination.

Petitioner also complains that adherence to a negotiated grievance procedure will cause delay and expense in implementing contracting-out determinations. However, these concerns do not qualify as a valid basis for undermining the negotiability of a contract proposal. *Department of Defense*, 659 F.2d at 1153. A negotiated grievance procedure is mandated by the Act, 5 U.S.C. 7121, and serves as a legislatively intended check for em-

ployees. The Court should note that in the give and take of bargaining encouraged by Congress, the agency is free to propose that the article pertaining to contracting-out procedures be excluded from the scope of the grievance procedure. Management has a means of protecting its interests without resorting to the judicial process with claims of dire consequences.

Overall, petitioner's sweeping arguments demonstrate a serious and unhealthy distrust of the grievance/arbitration process and of the Authority's ability to rectify or modify arbitration awards, 5 U.S.C. 7122, that impinge on management determinations protected by 7106(a). Obviously, Congress had more faith and confidence in the system that it legislated. This Court ought to protect what Congress has created rather than dismantle or greatly restrict it. The Authority's decision deserves deference and the judgment of the Court of Appeals, upholding the Authority, should be affirmed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a dispute concerning an agency's compliance with the laws and regulations that govern contracting out, including OMB Circular A-76, may be submitted to arbitration under 5 U.S.C. 7121.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS*[1]

Amicus, the National Treasury Employees Union (NTEU), is a federal sector labor union that is the exclusive bargaining representative of over 110,000 federal

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[1] Pursuant to Rule 36 of the Rules of this Court, all parties have consented to the filing of this brief. Their letters of consent are lodged with the Clerk.

employees nationwide. NTEU represents the interests of members of its bargaining units by, *inter alia*, negotiating collective bargaining agreements with agency employers and by arbitrating grievances under the agreements.

NTEU and its members have a vital interest in the outcome of this case, which presents issues concerning whether employees may grieve or arbitrate violations of OMB Circular A-76, a regulation which establishes the criteria and procedures agency employers must follow when deciding to contract out federal employees' jobs to private sector employees. Because the Court must determine whether the management rights clause of Title VII of the Civil Services Reform Act of 1978, 5 U.S.C. 7106(a)(2)(B), precludes arbitral review of agency compliance with the OMB directive and other laws governing contracting out, NTEU is submitting this brief to assist the Court in its consideration of these questions.

STATEMENT

1. This case involves the negotiability of a union proposal under The Federal Service Labor Management Relations Statute (the Statute), as amended, 5 U.S.C. 7101-7135. The proposal states that the EEOC "agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out." OMB Circular A-76 is a directive promulgated by the Office of Management and Budget pursuant to its statutory authority under the Budget and Accounting Act of 1921, 31 U.S.C. 1 *et seq.*, and the Office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. 401 *et seq.* The Circular establishes procedures agencies are required to follow in determining whether goods and services needed by the federal government should be obtained under contract or in-house. EEOC declared the proposal non-negotiable when it was submitted during contract talks.

2. On review, the FLRA ruled the proposal negotiable. *Pet. App.* 40a-48a. It determined that the proposal did not interfere with EEOC's reserved authority to make determinations with respect to contracting out.[2] The FLRA explained that if the proposal were adopted, it would not establish any substantive limitations on EEOC's authority, but would merely incorporate into the contract the existing legal limitation contained in OMB Circular A-76, and the other laws and regulations that concern contracting out. *Id.* at 41a.

The FLRA rejected the EEOC's contention that the terms of OMB Circular A-76 rendered the proposal non-negotiable. The Authority noted that under 5 U.S.C. 7121, contracting out disputes must be subject to the negotiated procedure unless the parties expressly excluded them through bargaining.[3] Therefore, even if the Circular did purport to narrow the avenues of redress available to employees, it could not limit the scope of the grievance procedure, because the scope is set by statute. *Pet. App.* 42a-43a.

3. The court of appeals (with Judge MacKinnon dissenting) affirmed the Authority's decision and enforced its order. *Pet. App.* 1a-37a. It rejected as "untenable" the EEOC's argument that the management rights clause automatically renders any proposal concerning contracting out non-negotiable, because the clause itself contemplates

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[2] Section 7106(a)(2)(B) of the Statute reserves to management, among other prerogatives, "the authority . . . in accordance with applicable laws . . . to make determinations with respect to contracting out."

[3] Section 7121(a) of the Statute requires collective bargaining agreements to include procedures for the settlement of "grievances," as broadly defined at Section 7103(a)(9). Only five matters, none of which concern contracting out, are excluded by law from the grievance mechanism. 5 U.S.C. 7121(c). Under 7121(a), any matter that could be grievable *is* grievable unless the parties agree to exclude it. 5 U.S.C. 7121(a)(2).

that management's contracting out authority must be exercised "in accordance with applicable laws," such as A-76. 5 U.S.C. 7106(a)(2)(B). Since the union's proposal did not impose any additional substantive criteria governing management's decision, it did not "affect" management's reserved authority to make contracting out decisions, within the meaning of the Statute. *Id.* at 8a-9a.

The Court also rejected the EEOC's argument that the union's proposal would invade management's rights by subjecting contracting out decisions to the negotiated grievance procedure. The Court noted that under the Statute, a complaint asserting that a contracting out decision was not made in accordance with applicable laws, including A-76, would be grievable even in the absence of the proposal, given the Statute's expansive definition of the subjects covered under the grievance procedure. *Pet. App.* 11a-16a. Such a grievance does not impose substantive limitations on management's authority; "[r]ather, it provides a procedure for enforcing the Act's requirement that contracting out decisions be made in accordance with applicable laws." *Id.* at 14a.

Finaliy, the Court rejected EEOC's argument that the language of the Circular itself, stating that its provisions "shall not be construed to create" any right of appeal, rendered the proposal non-negotiable. First, the Court observed, the proposal does not "create" a right of appeal because that right was created by the Statute's broad grievance provisions. *Pet. App.* 16a. Second, the court said, "there is no indication in the Act or elsewhere of a Congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure." *Id.*

SUMMARY OF ARGUMENT

A. Under the Federal Service Labor Management Relations Statute, unlike the Executive Order regime that preceded it, the negotiated grievance procedure and binding arbitration are the favored means for resolving a broad range of employment related complaints. The court

of appeals correctly determined that under the Statute, disputes concerning compliance with the laws and regulations that govern contracting out, including OMB Circular A-76, are grievable because they fall within the statutory definition of "grievance," and because contracting out disputes are not excluded from the grievance mechanism by Section 7121(c).

First of all, complaints relating to agency compliance with the Circular are grievances under 5 U.S.C. 7103(a)(9)(A). These complaints concern "matter[s] relating to . . . employment" because the Circular's procedures and criteria are used to determine whether an employee will retain his job. This conclusion is consistent with the broad language Congress employed in 7103(a)(9)(A), and with Congressional intent to make the term grievance "all-inclusive."

In any event, compliance with the Circular is subject to the grievance procedure on an entirely independent basis because the Circular is a "law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). The Circular is a "law, rule, or regulation" within the ordinary meaning of those terms because it is a statutorily based directive, that is published for notice and comment, and that is binding.

EEOC's argument that OMB Circular A-76 and other laws concerning contracting out are not sufficiently directly related to personnel matters and labor relations to be grievable is meritless. The Circular "affects conditions of employment" within the meaning of the Statute in its every application, since it determines whether employees will keep or lose their jobs to non civil service workers. In an analogous context, in the private sector, contracting out is considered a "condition of employment" subject to bargaining because it can result in the termination of employment.

B. The management rights clause does not bar application of the statutory grievance procedure to disputes con-

cerning agency compliance with OMB Circular A-76. That provision preserves management's authority to make contracting out determinations "in accordance with applicable laws." 5 U.S.C. 7106(a)(2)(B). By its own terms, the provision merely prohibits negotiation over substantive limitations on managerial authority beyond those imposed by external law. Since the proposal at issue here merely echoes the obligations already imposed upon EEOC by external law, it does not violate that prohibition.

EEOC's argument that arbitral review itself interferes with the exercise of its rights, would permit the management rights clause, which Congress intended to serve as a narrow exception to the obligation to bargain, to negate the grievance provision, which Congress made "all-inclusive." EEOC's argument employs the concepts of negotiability and grievability as though they were interchangeable, when in fact they are not. Many matters that are clearly grievable under Section 7121(a) require arbitrators to review the exercise of non-negotiable management rights to determine whether the agency has complied with external law. Yet Congress has not made every application of a management right non-grievable. Instead, it has exempted only five subject matters, none of which concern contracting out, from the grievance process.

EEOC's arguments that arbitral review will cause delay and expense are both irrelevant and unsubstantiated. Were additional delay or expense considered an infringement of management's rights, Congress would not have made the exercise of those rights subject to negotiation of "procedures" or "appropriate arrangements" (5 U.S.C. 7106(b)(2) and (b)(3)), and would have precluded arbitral review of any actions that implicate management's rights, not just those enumerated at 7121(c).

Contrary to EEOC's arguments, arbitral review will not result in "second guessing" of agency managers or misinterpretations of the Circular's requirements. Arbitrators in the federal sector are charged with, and there-

fore familiar with ensuring compliance with external law, as well as the collective bargaining agreement. Arbitrators will intrude no more into managerial discretion than the Circular permits, and if they overstep their authority, the FLRA will reverse their awards.

C. OMB may not limit the statutorily prescribed scope of the grievance procedure by including a clause in its regulations asserting that they are not subject to the grievance process. Section 7117(a)(1) does not give OMB that right, because Section 7121(a), which imposes the duty to include grievance procedures in the contract, augments the more limited general duty to bargain set out in Section 7117(a)(1).

Nor does the fact that contracting out is the "subject" of Circular A-76, render the union proposal non-negotiable. Section 7117(a)(1) prohibits bargaining over matters that are the subject of government-wide rules or regulations. The union is not attempting to "bargain" or "negotiate" about the matters contained in A-76, it is only seeking to incorporate them into the contract.

ARGUMENT

I. THE STATUTE ITSELF MAKES VIOLATIONS AND MISAPPLICATIONS OF OMB CIRCULAR A-76 AND OTHER LAWS AND REGULATIONS CONCERNING CONTRACTING OUT GRIEVABLE AND ARBITRABLE

The court of appeals correctly concluded that disputes concerning agency compliance with Circular A-76 are subject to the grievance procedure under 5 U.S.C. 7103(a)(9) and 7121(a). This conclusion follows from the clear expression of Congressional intent that, unlike the practice under the Executive Orders, the statutory grievance mechanism would cover virtually all employment related disputes in the federal sector.[4]

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[4] Although we address the issues here, when this case was before the court of appeals and the FLRA, the EEOC did not deny that a

A. Section 7121(a) of the Statute requires collective bargaining agreements in the federal sector to include "procedures for the settlement of grievances, including questions of arbitrability." "Grievance" is broadly defined as "any complaint by any employee concerning any matter relating to the employment of the employee," or any complaint concerning "any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment." 5 U.S.C. 7103 (a)(9)(A) and (a)(9)(C)(ii). Only those employment related complaints specifically enumerated in the Statute (at 7121(c)), may not be the subject of negotiated procedures. Matters which *could* be grievable under the foregoing provisions *are* grievable unless the parties expressly agree otherwise. 5 U.S.C. 7121(a)(2). *See*, H.R. Rep. No. 1717, 95th Cong. 2d Sess. 157 (1978); *AFGE, Locals 225, 1507 and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983).

By creating the statutory preference for this "broad scope" grievance procedure, Congress consciously departed from the relatively limited scope of the grievance arbitration process under the Executive Order program. *See*, Section 13, Executive Order 11491. Under the Statute, the term grievance was intended to be an "all-inclusive" one. H.R. Rep. No. 1403, 95th Cong. 2d Sess. 40 (1978).

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violation of OMB Circular A-76 would be grievable under the Statute, nor did it deny that the Circular was an "applicable law" that constrained management's authority to make contracting out decisions under 7106(a)(2)(B). EEOC argued only that management's right to make contracting out determinations overrides employees' statutory rights to grieve violations of the laws that govern contracting out. By failing to raise the central arguments it has presented to this Court until the eleventh hour, EEOC precluded the tribunal Congress has charged with interpreting the Statute—the FLRA—from considering them. Under established principles, this Court should decline to consider EEOC's contentions. *E.g. Hoover* v. *Ronwin* 104 S. Ct. 1989, 1998 n.25 (1984); *Berkemer* v. *McCarthy*, 104 S. Ct. 3138, 3152-53 & n.7 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 412 n. 7 (1982).

In addition to broadening the scope of grievances, Congress expanded the role of arbitrators in settling employment-related complaints, and in reviewing compliance with external law. Under Executive Order 11491 (at Section 14(a)), binding arbitration was not required, and under the earlier Executive Order 10988 (at Section 8(a)) it was not permitted at all. The Statute makes binding arbitration mandatory. 5 U.S.C. 7121(b)(3)(C). Congress made this change because experience under the Executive Orders had shown arbitration to be "an expeditious, credible, and cost-effective means of dispute resolution." *See* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 856 (Comm. Print 1979) (remarks of Rep. Ford) (hereinafter cited as *Leg. Hist.*). *See also, id.* at 923 (remarks of Udall).

B. OMB Circular A-76 is both a "matter relating to the employment of an employee" and a "law, rule or regulation affecting conditions of employment". Therefore, complaints concerning its application are grievable, unless the parties expressly agree otherwise.[5]

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[5] It is a universal practice in the federal sector to include provisions in the collective bargaining agreement like the one at issue here, in which agencies "agree" to comply with the law. This practice is followed, even though violations of laws that affect conditions of employment would be grievable in the absence of the provisions. The legality of the practice is firmly established, and EEOC does not challenge it. *Cf. Montana Air National Guard* v. *FLRA*, 730 F.2d 577, 579 (9th Cir. 1984).

EEOC nonetheless finds it anomalous that the union would seek to include the disputed proposal in the contract if, as we argue, violations of A-76 are already grievable. EEOC Br. 36, n.17. *See also, Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1402 (9th Cir. 1985). However, using the collective bargaining agreement to spell out the external laws to which the agency is subject

1. Agency compliance with the Circular, as the court of appeals noted, is "surely" a "matter relating to the employment of [an] employee" and therefore grievable under 5 U.S.C. 7103(a)(9)(A). *Pet App.* 13a-14a, n.18. EEOC's conclusory statement (Br. 38, n.19) that compliance with the Circular is somehow "too remote an issue" to relate to the employment of an employee, is unpersuasive. Its argument for a narrow construction of 7103(a)(9)(A) is completely at odds with the obviously broad language Congress employed and its explicit intent that the term grievance be "all-inclusive." A complaint alleging failure to comply with the standards governing contracting out is plainly a "matter . . . relating to employment". It is difficult to conceive of many matters more directly related to employment than the procedure an agency uses to determine whether it is cost effective to retain an employee in his position or whether to contract out his work. *Cf. Fibreboard Paper Products Corporation* v. *NLRB*, 379 U.S. 203, 210 (1964).[6]

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serves important practical purposes: First, it educates employees as to their rights and managers as to their obligations. Employees cannot be expected to comb the U.S. Code, Code of Federal Regulations, and the Federal Register to secure this information. Instead, the parties may choose to have all matters that govern their relationship encompassed in one document: the collective bargaining agreement. Moreover, expressly including an agreement to comply with existing law in the contract can circumvent in advance a later challenge to the arbitrability of a matter, thereby avoiding needless delay and expense.

[6] EEOC claims that assigning to subsections (a)(9)(A) and (B) the broad construction their language obviously requires would render subsection (C) superfluous. EEOC Br. 38, n. 19. This claim is meritless. Subsections (A) and (B) allow only employees and their representatives to file grievances when they have complaints concerning a matter relating to employment. Subsection (C) also gives the agency a right to pursue grievances, albeit only in the narrower category of situations where laws, rules, or regulations are implicated.

Moreover, even assuming that subsection (C) is subsumed by (A) and (B) with respect to employees and unions, that construc-

2. In any event, compliance with OMB Circular A-76 is grievable on an entirely independent basis because the Circular is also a "law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). The Circular, in addition to being a "presidential policy directive" (EEOC Br. 24-26), is a mandatory statutorily based directive, that agencies may not disregard as merely advisory, and that is published for notice and comment in the Federal Register. *See* Office of Federal Procurement Policy Amendments of 1979, 41 U.S.C. 401 *et seq.*, particularly Sections 402 and 405 (giving OFPP authority to establish procurement policies that "shall" be followed by agencies).

The fact that the Circular effectuates executive policy and may be characterized as a "managerial tool" (EEOC Br. 24) does not remove it from the scope of the grievance procedure. The grievability of violations of a similar executive directive, the Federal Personnel Manual, is well established. The FPM is an official publication of the Office of Personnel Management, containing instructions, guidance, advice and policy statements to agencies on matters of personnel management. Federal Personnel Manual, Ch. 171, Subch. 2-1. Circular A-76 is an official publication of OMB, that serves a similar purpose with respect to budgetary matters. Both directives may be considered laws, rules, or regulations within the meaning of the Statute, because both are mandatory directives issued by agencies with statutory authority to oversee and establish uniform policy for all agencies in areas of government wide concern.

Contrary to EEOC's argument (Br. 24-26), whether or not APA review of an agency's compliance with the Cir-

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tion is still preferable to the construction EEOC suggests. Under EEOC's interpretation, the broad language of subsections (A) and (B) has no significance, and Congress' intent that the term grievance be "all inclusive" is frustrated.

cular is available is not relevant to whether the Circular's requirements may be considered "laws, rules or regulations" under Section 7103(a)(9)(C)(ii). There is nothing in the Statute or its legislative history to even suggest that Congress intended arbitral review to be coextensive with APA review; it did not define grievability by reference to the APA. Thus, regardless of the propriety of denial of APA review, compliance with the Circular's requirements may be subject to arbitral review under the Statute.[7]

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[7] In support of its argument that A-76 is not a "law, rule, or regulation," EEOC cites *Local 2855, AFGE* v. *United States*, 602 F.2d 574 (3d Cir. 1979) and *AFGE Local 2017* v. *Brown*, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 459 U.S. 1184 (1983) (declining to consider specific APA challenges to agency failures to comply with contracting out regulations). EEOC Br. 25-26.

But these cases do not even establish that violations of the Circular issued in 1979 are not subject to APA review, much less that they are not grievable. The *Local 2855* case concerned the old version of Circular A-76, rather than the 1979 issuance. The latter, of course, unlike the prior directive, was based on a specific delegation of Congressional Authority, the Office of Federal Procurement Policy Amendments of 1979, 41 U.S.C. 401 *et seq.* The 1979 Circular moreover, was far more detailed than the pre-1979 version. *See*, 44 Fed. Reg. 20556-57 (1979), (describing former Circular as "rather general" in comparison and describing changes). The *AFGE Local 2017* decision did not hold Circular A-76 was not law; indeed it noted that parts of A-76 had the status of law, by virtue of the Department of Defense Authorization Act. 680 F.2d at 724. The court declined review because it believed the particular question the plaintiffs raised was committed to agency discretion.

The cases do not hold compliance with A-76 is non-reviewable no matter what violation is alleged. In ruling the matters involved were "committed to agency discretion by law", the courts were merely responding to the types of challenges mounted in those cases. In fact, the *Local 2855* court noted that even where matters are committed to agency discretion by law, judicial review is still available if a specific regulatory command is violated. 602 F.2d at 580. As we describe *infra* at page 22, n.12, Circular A-76 contains many requirements that leave no discretion to agencies and for which review might be appropriate by an arbitrator, just as it would be by a court.

3. EEOC's contention (Br. 29-34, 37-38) that OMB Circular A-76 and other laws concerning contracting out are not sufficiently directly related to personnel matters and labor relations to be covered under 7103(a)(9)(C)(ii) is baseless. The grievance mechanism covers laws, rules, or regulations that affect "conditions of employment." Conditions of employment is in turn defined as "personnel policies, practices and matters affecting working conditions." 5 U.S.C. 7103(a)(14).

OMB Circular A-76 is a law that affects conditions of employment for the same reasons it concerns a "matter relating to . . . employment." *See*, *supra* at 10. Clearly, a law governing contracting out decisions concerns personnel policies and affects working conditions in the most direct and immediate sense possible, and in its every application, for it determines whether employees will keep their jobs. Thus, in *Fibreboard Paper Products*, this Court ruled that in the private sector, contracting out is a "condition of employment," because those words "plainly cover termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit." 379 U.S. at 210. The same result obtains in the federal sector. *Cf. AFGE and Air Force Logistics Command, Wright-Patterson AFB*, 2 F.L.R.A. 604, 606 (1980) *enforced as to other matters*, 659 F.2d 1140 (D.C. Cir. 1981) (availability of day care facilities is a condition of employment because it affects whether individual will accept and continue employment).[8]

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[8] EEOC also argues (Br. 37) that if the grievance provision covers laws that concern contracting out, then "every federal statute that arguably affects a unionized federal employee" will be subject to arbitration. For example, EEOC says (Br. 34), an employee could pursue a grievance alleging that he would not have been reassigned had an agency employer complied with the National Environmental Policy Act, or the Atomic Energy Act.

EEOC's statutory examples are obviously distinguishable from laws governing contracting out. Those Acts at most may affect an

4. EEOC contends (Br. 29-34) that precedent of the Federal Labor Relations Council supports its argument that A-76 is not sufficiently related to conditions of employment to be within the scope of the grievance procedure permitted by the Statute. It claims that under FLRC decisions, contracts could not incorporate agency regulations bearing on the types of employees that would be assigned to different projects, and speculates that the FLRC so held "apparently because such decisions relate less to the individual employee than to the manner in which the agency wishes to conduct its business." EEOC Br. 31.

EEOC's reliance on this precedent is misplaced. The two FLRC cases EEOC cites (Br. 31-32) ruled that proposals requiring the employer to comply with certain internal agency directives (concerning assignment of employees) were not negotiable. *AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma*, 5 F.L.R.C. 604 (1977); *AFGE Local 2118 and Los Alamos Area Office, ERDA*, 3 F.L.R.A. 296 (1975). The FLRC stated that the proposals would constrain management rights, and that it was "without significance" that management used internal regulations to establish the policies that guided the exercise of its rights. *AFGE Local 916*, 5 F.L.R.C. at 607. The FLRC did not explain this conclusion—it certainly did not, as the EEOC suggests, purport to rule that the regulations were not "applicable laws" within the meaning of the Executive Order's management rights clause.

EEOC's suggested interpretation of the FLRC's decisions is pure speculation. It is more likely that the FLRC

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employee's employment indirectly. By contrast, every application of the laws that govern contracting out concern personnel policies and potentially affect federal employees' jobs. Circular A-76, unlike NEPA or the Atomic Energy Act, is a law designed to effectuate the government's personnel policies and to affect conditions of employment.

found the proposals non-negotiable because the regulations at issue were internal agency directives, rather than regulations imposed by an external authority like OMB. By incorporating internal regulations into the contract, the agency's right to change its policies at will would be constrained. OMB Circular A-76, by contrast, is an external law with which agencies must comply, regardless of the contract.

II. THE MANAGEMENT RIGHTS CLAUSE DOES NOT PRECLUDE ARBITRAL REVIEW OF AGENCY COMPLANCE WITH OMB CIRCULAR A-76 AND OTHER LAWS THAT CONCERN CONTRACTING OUT

As we explained above, Section 7121(a) permits the parties to negotiate procedures for grieving and arbitrating any employment related complaints or any violation of laws, rules, or regulations that affect working conditions, except in those subject areas specifically enumerated at subsection (c). Although complaints or violations of the laws governing contracting out are not among those excluded matters, EEOC's central contention here is that the management rights clause, 5 U.S.C. 7106(a)(2)(B), bars use of the grievance procedure to resolve any contracting out dispute.

A. The management rights provision states that: "subject to subsection (b) of this section, nothing in the chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). As the court of appeals discerned, by use of the phrase "in accordance with applicable laws," Congress made it clear that the management rights clause merely prohibits negotiation over substantive limitations on managerial authority beyond those already imposed by external law. Pet. App. 8a-9a. The union's proposal that EEOC comply with the rules by

which it is undeniably governed does not work an impermissible constraint on management's reserved authority.[9]

B. EEOC contends nonetheless (Br. 17-22, 22-29) that arbitral review itself, even if only for compliance with external law, would impermissibly affect its authority to make decisions with respect to contracting out. This contention, however, would permit the management rights clause, which Congress intended to serve as a narrow exception to the general rule of negotiability, to negate the grievance provision, which Congress intended would be "all-inclusive." Under the EEOC's approach, employees could not grieve any matter that implicates a management right. The EEOC's proposed rule would entirely abnegate the principle of broad scope grievance procedures.

In fact, many matters that are clearly grievable under 7121(a) require arbitrators to review agency actions that implicate managerial rights for compliance with law. For example, the management rights provision preserves management's authority, in accordance with law, to direct, assign, layoff, and discipline employees. 5 U.S.C. 7106 (a)(1)(A). Under EEOC's view, violations of the laws applicable to these decisions would—contrary to accepted practice—not be subject to arbitral review. Indeed, under EEOC's view it is difficult to imagine any challenges at all that could be pursued under the negotiated procedure, since most management actions involve determinations made under the authority preserved in 7106(a) and (b)(1).

The fundamental flaw in EEOC's argument is that it consistently employs the concepts of grievability and negotiability interchangeably, although they are distinct.

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[9] EEOC argues (Br. 34-35) that even if the regulation is an "applicable law" it only constrains management's authority to the extent that contracting out decisions can be challenged within the agency. As we explain more fully *infra*, at 22-25, OMB is without authority to limit the scope of the grievance procedure the Statute prescribes.

There are many matters a union may not negotiate—such as the subject matter of statutes and government-wide regulations, or management rights—whose application employees may nonetheless grieve. By blending the two concepts, EEOC is attempting to expand the number of matters that are non-grievable.

But Congress clearly declared which matters are non-grievable—in Section 7121(c). When Congress wished to make any aspect of a non-negotiable management right non-grievable as well, it did so there. Congress could have said that every application of a management right is non-grievable, but it did not. Instead, in Section 7121(c), it made five specific matters non-grievable, and contracting out decisions are not among them.

The legislative history of the Statute, contrary to EEOC's argument, shows that Congress never intended the management rights clause to be interpreted to negate the broad grievability provision. It clearly shows that Congress perceived that arbitral review was entirely consistent with management's exercise of its preserved authority.

The exact language of Section 7106 originated in a floor amendment offered by Representative Udall. In an accompanying sectional analysis he explained that although his amendment added several management rights, the management rights section "is still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." He stated that the provision would have no effect upon employees' rights to file grievances. Representative Udall explained that, for example:

> "[M]anagement has reserved the right to make the final decision to "remove" an employee but that decision must be made in accordance with the applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The re-

> served management right to 'remove' would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in the collective bargaining agreement."

Leg. Hist. at 924.

Representative Ford, one of the chief House conferees on the bill, made a similar statement on the floor of Congress. Describing the relationship of the grievance provisions to management's rights be explained:

> Under the definition [of grievance] adopted by the conferees, so long as a rule or regulation 'affects conditions of employment,' infractions of that rule or regulation are grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right. *Leg. Hist.* at 998.[10]

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[10] *See* also, *Leg. Hist.* at 994 (remarks of Rep. Ford) ("Only bargaining proposals which directly relate to the actual exercise of the enumerated management rights are to be ruled non-negotiable. An indirect or secondary impact on a management right is insufficient to make a proposal non-negotiable").

EEOC contends (Br. 39-40) that under the Executive Order, employees could not grieve matters that implicated management's rights. This is inaccurate; the very cases EEOC cites at page 31 of its brief involved arbitral review of actions taken under management's preserved authority to promote or discipline.

EEOC also says that the Senate bill "plainly did not envision that management rights would be grievable" because it permitted the negotiated procedure to "cover any matter . . . if not inconsistent with the provisions of this chapter" and because it made the scope of the procedure negotiable, while at the same time stating that management rights are not negotiable. EEOC Br. 39-40.

First of all, it is not "inconsistent" with the preservation of management rights to permit arbitral review for compliance with law. Second of all, the Conference Committee rejected the Senate's approach of making grievance scope negotiable. It mandated broad

C. EEOC argues that in the context of OMB Circular A-76, arbitral review will inevitably affect substantive decisionmaking. It contends that such review will cause delay and expense, and that arbitrators are bound to interfere with legitimate exercises of agency authority under the Circular. EEOC Br. 16-12.

1. First of all, even if arbitral review caused added delay and expense, that result could not be considered an interference with management's rights. Management has, after all, no right to violate the law, nor to go unquestioned. If Congress were concerned with delay or expense, it would not have made the exercise of management rights subject to negotiation concerning "procedures" and "appropriate arrangements," (5 U.S.C. 7106(b)(2) and (b)(3)) and it would have precluded arbitral review of any actions that implicate management rights, not just those actions described in 7121(c). Congress enacted the management rights provision to protect management's authority to establish substantive criteria, not to preclude proposals that would permit review of the application of the criteria in a particular case. EEOC's delay and expense arguments involve questions of policy, more properly addressed to Congress.[11]

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scope procedures unless the parties agreed otherwise. Mandating broad scope procedures while at the same time guaranteeing management rights clearly shows that Congress concluded the two were not inconsistent, and that management rights would not be "affected" by arbitral review.

[11] In many instances, the procedures and appropriate arrangements created at the bargaining table under 5 U.S.C. 7106(b)(2) and (b)(3) will delay the execution of management's decisions. Nonetheless, only if the procedure would prevent management from "acting at all" did Congress envision a violation of management's rights—it specifically rejected a provision that would have made a procedural proposal non-negotiable because of delay even where the delay the proposal engendered was "*unreasonable*". H.R. Rep. No. 1717, 95th Cong. 2d Sess. 158 (1978); *Department of Defense, Army Air-Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1155-

2. Further, EEOC's fears of delay are belied by the efficacy of the arbitral process. As this Court has noted, arbitration tends to promote the expeditious resolution of disputes and not, as the EEOC argues, protracted delay. *Boys Markets Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 240 (1970). "It is for this reason," the D.C. Circuit has explained, "that arbitration is so widely favored in both public and private sector labor relations." *Department of Defense* v. *FLRA*, *supra*, 659 F.2d at 1158, n.98.

EEOC's assertion (Br. 19-21 & n.10) that delays will be caused by arbitral review and that these delays will cost the government $142 million in the years 1986-1989, moreover, has no support in the record. OMB cannot predict the extent to which review will cause delay or the cost of that delay, unless it also factors in the cost savings achieved because arbitral review will foster compliance with the Circular.

Moreover, employees as well as agencies have an interest in the speedy resolution of contracting out disputes. Thus, Congress has required negotiated procedures to be "fair and simple" and to provide for "expeditious processing." 5 U.S.C. 7121(b). The FLRA moreover, has provided for stays of arbitral awards pending review, so that arbitrators' decisions need not delay agency action that is permissable under law. 5 C.F.R. 2429.8. Of course, if the arbitrator's finding of non-compliance with the Circular is upheld on review, the agency must blame only itself and not the arbitral process for added delay and expense.

3. EEOC also protests that arbitral review will inevitably result in "second guessing" the agency's discre-

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57 (D.C. Cir. 1981) cert. denied, 455 U.S. 945 (1982); *NTEU* v. *FLRA*, 712 F.2d 669 673-674 (D.C. Cir. 1983). As The Conference Report explained, under subsections (b)(2) and (b)(3), "the parties may indirectly do what [subsection (a)] prohibits them from doing directly." H.R. Rep. No. 1717, *supra* at 158. *Cf. AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1187-1188 (D.C. Cir. 1983).

tion or misinterpreting the Circular's requirements, and that arbitral rulings on A-76 "will be grounded on considerations other than simple fidelity to the requirements of the Circular." EEOC Br. 21-22, 29. Like its "delay" and "expense" argument, however, this sort of objection could be posed to every form of arbitral review of agency compliance with external law. The objection has no merit because Congress has chosen, in the federal sector, to give arbitrators a significant role in interpreting the law. And it has put a check on their decisions by providing for review by the FLRA where the arbitral award is contrary to "law, rule, or regulation." 5 U.S.C. 7122.

EEOC's observation that arbitrators' competence "pertains primarily to the law of the shop, not the law of the land," and that arbitrators "effectuate the intent of the parties rather than the requirements of enacted legislation," Br. at 21, 29, quoting *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36, 56-57 (1974), is particularly inappropriate in the context of federal sector arbitration. In the federal sector, where binding arbitration is required, the law of the shop and the law of the land are one and the same, because the employment relationship is governed by statute, and violations of law are grievable. As the D.C. Circuit has noted, "in the federal sector . . . arbitration is intended not only to ensure compliance with collective bargaining agreements, but also 'to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike'." *Devine* v. *White*, 697 F.2d 421, 438 & n.94 (D.C. Cir. 1982), quoting F. Elkouri & E. Elkouri, Legal Status of Federal-Sector Arbitration, 6-7 (1980).

There is no reason to suppose that an arbitrator will interfere with agency discretion or expertise, or misinterpret the Circular, any more than he would do so with any other law. Acknowledging the availability of arbitral review in contracting out disputes does not *ipso facto* sanction intrusion or second guessing, nor does it suggest

that every allegation that A-76 was violated will be arbitrable. Section 7121(a) requires collective bargaining agreements to include procedures for determining "questions of arbitrability," and Section 7122 provides for FLRA review. It would be most inappropriate for this Court to rule, as EEOC urges, that because some aspects of A-76 reserve discretion to managers, every agency violation of A-76, or any other law and regulation concerning contracting out, is non-reviewable.[12]

III. OMB CANNOT LIMIT THE STATUTORILY PRESCRIBED SCOPE OF THE GRIEVANCE PROCEDURE BY REGULATION

EEOC contends finally (Br. 42-47) that the union proposal at issue here is non-negotiable because 5 U.S.C. 7117(a)(1) states that the duty to bargain only exists "to the extent not inconsistent with any Federal law or any government-wide rule or regulation" and does not "extend to matters which are the subject of . . . a Government-wide rule or regulation." It claims that the union proposal is inconsistent with A-76, which is a government-wide rule or regulation and that in any event

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[12] In fact, A-76 contains a number of mandatory directives that leave agencies no discretion and under which there are clear guidelines and criteria to which an arbitrator could refer. The Circular cites specific examples of governmental functions that may not be contracted out under any circumstances (for example tax collection), 44 Fed. Reg. 20558; it requires agencies to review activities periodically and to conduct cost comparisons, *id.* at 20560-20561; and it mandates in detail the factors an agency must consider in conducting a cost analysis, *id.* at 20564-20591. The factors include specific percentages the agencies must employ in deriving the cost of fringe benefits or the value of assets. *Id.* An agency has no discretion to fail to perform these mechanical procedures in the manner the Circular requires, and there is no reason an arbitrator cannot determine whether they have done so, without invading the prerogatives, if any, the Circular reserves to management.

the proposal is non-negotiable because it concerns the subject of such a rule or regulation—contracting-out.[13]

A. To the extent that Circular A-76 purports to prescribe that its violation is non-grievable, it is inconsistent with Section 7121(a) of the Statute (see *supra* at 7-15) and therefore invalid. As the court of appeals stated: "[t]here is no indication in the Act or elsewhere of a congressional intent to allow agencies to limit the statutory right to file grievances asserting a violation of contracting-out regulations." *Pet. App.* 16a.

Indeed, the clear statutory duty to bargain over the scope of the grievance procedure belies EEOC's argument that Section 7117(a)(1) gives agencies the right to limit the scope by regulation. The legislative history of the provision creating that duty (Section 7121) shows that Congress intended that the only matters that could be excluded from the grievance procedures were those the parties agreed to exclude, or those enumerated in the law under 7121(c). *See*, H.R. Rep. No. 1717, *supra* at 157.

Read in light of 7121 and its history, Section 7117(a)(1) plainly does not give agencies the authority to limit by regulation the statutorily prescribed scope of the grievance procedure. Instead, Section 7117(a)(1) was intended to preclude an agency from negotiating proposals that are substantively inconsistent with a government-wide rule or regulation.

Two courts of appeals have adopted this reasoning. They have concluded that Section 7121(a), which imposes

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[13] We find it ironic that EEOC can assert Circular A-76 is a government-wide rule or regulation within the meaning of 7117(a)(1) because it is a binding policy imposed upon agencies by OMB, but that it also repeatedly disclaims that the directive is a law, rule, or regulation for any other purpose. EEOC's explanation of that anomaly (Br. 43, n.23) merely begs the question. It does not explain why Congress used the same "rule" or "regulation" language in defining a grievance, as it did under 7117.

the duty to include grievance procedures in the contract, "augments the more general duty to bargain set out in 7117(a)(1), and therefore may be interpreted to apply, even in circumstances where 7117(a)(1) would not otherwise require bargaining." *N.J. Air National Guard* v. *FLRA*, 677 F.2d 276, 283 n.7 (3d Cir.), cert. denied, 459 U.S. 988 (1982). *Accord, State of Nebraska, Military Dep't* v. *FLRA*, 705 F.2d 945, 950, n.8 (8th Cir. 1983). As the two courts of appeals concluded, the purpose of 7117(a)(1) is to limit the negotiability of proposals, not to limit the grievability of the violation of laws, rules or regulations. Obviously, Congress did not create Section 7117(a)(1) to permit agencies to nullify broad scope grievance procedures.[14]

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[14] Thus, the *N.J. Air National Guard* and *State of Nebraska* cases cited by EEOC (Br. 45-46) do not support its interpretation of 7117(a)(1), they support the court of appeals' decision below. Those cases involved a conflict between the union proposal and a statutory provision restricting grievability. In those cases, the courts were required to reconcile conflicting statutes and they eschewed reliance upon 7117(a)(1). This case, on the other hand, involves not a statute, but a regulation, which obviously cannot override the Congressional mandate contained in 7121.

California National Guard v. *FLRA*, 697 F.2d 276 (9th Cir. 1983), also cited by EEOC, involved the same issue as *N.J. Air National Guard* and *State of Nebraska*—whether the exclusive appeal mechanism of the National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5), precluded grievances under Section 7121. The court of appeals in *California National Guard*, unlike the other courts, placed some reliance on 7117(a)(1). But that court also said Section 7117(a)(1) was "designed specifically for situations where . . . the sweeping legislative scheme may come into conflict with other federal statutes." To the extent that the *California National Guard* decision could be interpreted to preclude bargaining over grievance procedures in the absence of a statutory conflict, we believe the decisions of the Third and Eighth Circuits are more persuasive. In fact, the Ninth Circuit purported to rely on the "well-reasoned" *N.J. Air National Guard* decision for its holding. *See also Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187 (7th Cir. 1983) (adopting reasoning of Third, Eighth and Ninth Circuits).

B. EEOC's second argument, under 7117(a)(1), portends even greater danger to the statutory scheme. It claims that since contracting out is the "subject" of Circular A-76, which is a government-wide rule or regulation, "the duty to bargain" does not extend to the union's proposal. EEOC Br. 46-47.

But the union is not seeking to "bargain" or negotiate over A-76; it will merely incorporate the regulation into the contract. There would be no "discussion" of A-76 at the bargaining table. *See*, EEOC Br. 47. The purpose of precluding "bargaining" over matters that are already the subject of government wide rules was clearly to prevent individual agencies from adding new substantive requirements at the bargaining table. Under EEOC's argument—contrary to uniform practice—contracts could never incorporate any provision in which an agency agrees to comply with an existing statute, rule or regulation. Plainly, that is not what Congress had in mind when it precluded "negotiation" over matters which are covered by a government-wide rule or regulation.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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